No. _____

In The

Supreme Court of the United States

BARRY J. NACE,

Petitioner,

v.

LAWYER DISCIPLINARY BOARD,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

J. MICHAEL BENNINGER
BENNINGER LAW, PLLC
154 Pleasant Street
Morgantown, West Virginia 26505
(304) 241-1856
mike@benningerlaw.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

This case is one of first impression involving the usurpation of the district court's (bankruptcy court) exclusive jurisdiction under 28 U.S.C. § 1334(e)(2) by a state court in its lawyer disciplinary proceeding initiated by an ethics complaint filed by the interim trustee appointed under 11 U.S.C. § 701 concerning legal and ethical duties (negligence) owed to him in a pending bankruptcy case by a lawyer allegedly employed as special counsel under 11 U.S.C. § 327(e). The interim trustee also filed a civil action in an adversary proceeding in the pending bankruptcy case, alleging a breach of the legal and ethical duties (negligence) owed to him by special counsel.

The questions presented are:

1. Whether the Supreme Court of Appeals of West Virginia violated the Supremacy Clause and Petitioner's procedural due process rights when it exercised jurisdiction and refused to stay its lawyer disciplinary proceeding until the federal courts determine the validity of an order approving the employment of special counsel under § 327(e) and the extent of the legal and ethical duties owed by the respective parties in the pending bankruptcy case.

2. Whether the Supreme Court of Appeals of West Virginia violated the Supremacy Clause and Petitioner's procedural due process rights when it exercised jurisdiction and applied state common law instead of federal bankruptcy law in its lawyer disciplinary proceeding to determine the existence and definition

QUESTIONS PRESENTED – Continued

of the relationship (attorney-client rather than supervisor-supervisee) between the interim trustee and special counsel allegedly employed under § 327(e).

3. Whether the Supreme Court of Appeals of West Virginia violated the Supremacy Clause and Petitioner's procedural due process rights when it exercised jurisdiction and held that he violated the West Virginia Rules of Professional Conduct in performing his legal and ethical duties in the pending bankruptcy case and it fashioned a severe sanction under Rule 3.16 without first knowing or considering required factual information, including the federal courts' determination of the validity of an order approving special counsel, the extent of debtor's interest in the litigation proceeds and her claimed exemption of same, the interim trustee's own breach of mandatory legal and ethical duties under 11 U.S.C. § 704, and the extent of actual harm, if any, all of which have yet to be determined in the pending bankruptcy case.

4. Whether the Supreme Court of Appeals of West Virginia violated the Supremacy Clause and Petitioner's procedural due process rights when it held that the interim trustee had the authority and duty under the West Virginia Rules of Professional Conduct to file the ethics complaint against Petitioner without considering the interim trustee's limited statutory authority under 11 U.S.C. § 704 and the bankruptcy court's exclusive jurisdiction of the issues in dispute.

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OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia (State Court) in this lawyer disciplinary proceeding, filed on March 28, 2013, is not yet reported but is available at 2013 WL 1285981. (App.1.) The case was initially heard by the Hearing Panel Subcommittee (Subcommittee) of the West Virginia Lawyer Disciplinary Board (Board) and its report, issued on March 21, 2012, is unreported. (App.40.) The State Court then issued an unreported order on January 9, 2013, denying, among other things, the motion to stay the lawyer disciplinary proceeding. (App.76.) Lastly, the State Court issued an unreported order on May 16, 2013, denying the timely filed petition for rehearing and granting a 90-day stay of mandate to allow time for the filing of this Petition. (App.78.)

JURISDICTION

Pursuant to the provisions of 28 U.S.C. § 1257(a), this Court is vested with jurisdiction to review the Opinion filed by the State Court on March 28, 2013, after rehearing was denied on May 16, 2013.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article I, Section 8, Clause 4, provides:

> The Congress shall have the power . . . to establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

The United States Constitution, Article VI, Clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The United States Constitution, Amendment V provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The United States Constitution, Amendment XIV provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

The United States Code 28 U.S.C. § 1334 provides, in relevant part:

> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –
>
> (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
>
> (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

The United States Code 11 U.S.C. § 327 provides, in relevant part:

> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

The United States Code 28 U.S.C. § 157 provides, in relevant part:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, . . .

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

STATEMENT OF THE CASE

A. Introduction and Summary of Opinion below

The issues presented in this case arose in a Chapter 7 "no asset" bankruptcy case filed in the Northern District of West Virginia in 2004. The dispute developed between the interim trustee (Trustee) appointed in the case under 11 U.S.C. § 701 and the special counsel allegedly employed by the Trustee with bankruptcy court approval under 11 U.S.C. § 327(e). Petitioner Barry J. Nace (Petitioner) is the lawyer who was allegedly employed as special counsel. Petitioner has always maintained that he was not lawfully employed as special counsel and, as such, owed no legal or ethical duties to the Trustee.

The dispute resulted in the Trustee's filing (1) a state lawyer ethics complaint against Petitioner in 2009; and, (2) a civil action against him in 2010 for legal malpractice in an adversary proceeding in the pending bankruptcy case. In both proceedings, the Trustee maintained that he is a "client" for application of the West Virginia Rules of Professional Conduct and Petitioner was negligent in representing him in the bankruptcy case.

There have been no lawyer disciplinary proceedings sought by the Trustee or initiated against Petitioner by the bankruptcy court in the pending bankruptcy case pursuant to the bankruptcy court's inherent power and under the available local court rule. The bankruptcy court has not made a referral of this matter to the State Court or the Board for initiation of lawyer disciplinary proceedings.

No assertions have been made that Petitioner was negligent in handling the underlying state court medical malpractice wrongful death case arising from the death of debtor's husband. The only assertion of negligence is that Petitioner should have turned over the proceeds from the partial settlement and the subsequent verdict in the medical malpractice case to the Trustee and not the debtor. (App.92.) The Trustee claimed attorney fees from those proceeds, which fees were greater than all debts and creditor claims in the bankruptcy case. (App.100.) The issues of negligence and the Trustee's claims involve estate property and the administration of the debtor's estate which fall squarely within the exclusive jurisdiction of the

bankruptcy court and not the State Court and have yet to be resolved in the pending bankruptcy case.

The State Court and the Board assumed jurisdiction over the ethics complaint filed by the Trustee and proceeded to judgment, even though Petitioner repeatedly argued that exclusive jurisdiction for construing and deciding special counsel employment issues raised under § 327(e) was vested in the district court (bankruptcy court) pursuant to 28 U.S.C. § 1334(e)(2) and that same would be core proceedings under 28 U.S.C. § 157(b)(2)(A). (App.123-125.)

The State Court acknowledged in footnote 10 of its opinion that it lacked subject matter jurisdiction to determine the validity of the bankruptcy court's order authorizing the employment of Petitioner as special counsel. The Court stated, in footnote 10:

> **This court does not have jurisdiction to determine whether the order was valid; however, the validity of the order is irrelevant to whether an attorney-client relationship formed in this case.** We do note, however, that if the order is ultimately found to be invalid, while it will not nullify the attorney-client relationship, it may affect Mr. Nace's liability. [Emphasis added.]

(App.24-25.) The statement by the State Court that the "order is irrelevant" shows the fundamental disconnect between its application of state common law to the issue of the formation of an attorney-client relationship and the specific requirement of entry of a

valid order approving the employment of special counsel as expressed by Congress under § 327(e).

In other words, absent the entry of a valid order, Petitioner was not properly employed as special counsel to the Trustee, and, therefore, no attorney-client relationship was formed under federal bankruptcy law. The State Court also gave no credence to the fact that if the order is deemed valid, the actual relationship created between the trustee and special counsel was one of supervising and managing lawyer to the subordinate special counsel. This is clearly spelled out in the handbook for Chapter 7 trustees, which was made a part of the evidence in the lawyer disciplinary proceeding. Without an attorney-client relationship being formed, Petitioner owed no legal or ethical duties to the Trustee.

The State Court circumnavigated its admitted lack of jurisdiction as noted below:

> To the extent that Mr. Nace entered into an attorney-client relationship with Mr. Trumble, Mr. Nace practiced law in West Virginia. It is patently clear from our case law that the Court has the authority to supervise, regulate and control the practice of law in this state, and so the Court has subject matter jurisdiction over Mr. Nace's practice of law in West Virginia. Contrary to Mr. Nace's suggestion, the Court is not divested of jurisdiction, merely because the order appointing him as special counsel was entered in the bankruptcy court. **The disciplinary**

> **proceeding before this Court is not contingent upon the construction of the order appointing him special counsel; instead, it depends only on whether an attorney-client relationship formed, which did occur. The duties and responsibilities the LDB asserts Mr. Nace owed to Mr. Trumble and violated are those dictated by the Rules of Professional Conduct, not those required by the order.** [Emphasis added.]

(App.29.) Contrary to the State Court's conclusion, § 1334(e)(2) commands otherwise; the bankruptcy court shall have exclusive jurisdiction "over all claims or causes of action that involve construction of § 327."

Petitioner has never challenged the jurisdiction of State Court to regulate and control the practice of law in West Virginia. He does, however, challenge its refusal to recognize and acknowledge the significance of the bankruptcy court's order approving his employment as special counsel under § 327(e) and the serious legal issues raised as to its construction and validity, determinations yet to be made by the bankruptcy court within its exclusive jurisdiction under 28 U.S.C. § 1334(e) in the pending bankruptcy case.

The State Court has, thus far, refused to accept the fact that Petitioner could never have served as special counsel under § 327(e) without a valid order having been entered approving the relationship with Trustee under federal bankruptcy law. Whether the order is invalid for any number of reasons assigned

by Petitioner is a determination that can only be made by the bankruptcy court under its exclusive jurisdiction applying federal bankruptcy law – not state common law.

An example of one of the factual and legal issues examined and decided by the State Court, in exceeding its jurisdiction, was its conclusion regarding the significance of whether Petitioner was, in fact, properly served with and received notice of the entry of the order entered by the bankruptcy court on March 4, 2005.

In this regard, the State Court said:

> Under the facts of this case, **it is inconsequential to the formation of the attorney-client relationship whether Mr. Nace received notice that the order appointing him special counsel had been entered in the bankruptcy court**; formation of the attorney-client relationship in this case was conditioned on the entry of the order, not entry of the order and delivery of notice to Mr. Nace. [Emphasis added.]

(App.25.)

Contrary to the State Court finding that notice is "inconsequential," notice has always been a fundamental tenet of federal procedural due process in all adjudicatory proceedings. It should have no less importance in the context of a lawyer disciplinary proceeding. Where the entry of an order authorizes and establishes the formation of the attorney-client

relationship, a lawyer should not be sanctioned for allegedly violating legal and ethical duties to a client without first having a full and fair opportunity to present his defense of lack of notice in the court directly empowered and involved in the approval of his employment – the bankruptcy court. Congress intended this procedure to be available when needed and 28 U.S.C. § 1334(e)(2), combined with 28 U.S.C. § 157(b)(2)(A), is a clear expression of its intent.

Reliance by the State Court on state common law to define when and under what circumstances an attorney-client relationship was formed in special counsel context is constitutionally impermissible and contrary to the Trustee's testimony. The State Court said in its opinion "our common law governs the formation of the attorney-client relationship." (App.22.) It also relied upon a "long held precedent" and said:

> **As soon as a client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established**; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation. [Emphasis added.]

(App.23.)

However, the Trustee testified during the lawyer disciplinary proceedings that he lacked the authority

to retain Petitioner as special counsel for the specified special purpose of prosecuting the state court medical malpractice case absent bankruptcy court approval under § 327(e). (App.135.)

Unlike a typical client in a non-bankruptcy matter seeking to retain legal counsel, the Trustee was required by his official status as an officer of the bankruptcy court to seek approval for employment of special counsel, under the guidance of § 327(e) and Rule 2014, Federal Bankruptcy Rules. State common law plays no part in determining the existence of this special relationship between lawyers who are both officers of the bankruptcy court. Federal bankruptcy law, as enacted by Congress, is preemptive of all other sources of law which affect its application or conflict with it. West Virginia common law is thus preempted, here.

In addition to asserting a lack of notice, Petitioner presented a federal defense to the validity of the bankruptcy order entered on March 4, 2005, approving his employment as special counsel. The defense was based upon this Court's holding in *Taylor* v. *Freeland and Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992). The basis of the defense is well established in the record and arises from the Trustee's failure to timely object to the debtor's identification and claimed exemption of the state court medical malpractice case being handled by Petitioner on behalf of her husband's estate and her interest in it. (App.94-97, 126-129.)

In summary, because the Trustee failed to object to the claimed exemption within 30 days as required by Bankruptcy Rule 4003(b), the state court case, and the debtor's interest in it, did not become a part of the debtor's estate under 11 U.S.C. § 541. (App.94-97.) The resulting legal effect of the Trustee's failure to object to the claimed exemption is the removal of the exempted property, by operation of law, from the estate and, thus, from the bankruptcy court's jurisdiction. As such, the bankruptcy court lacked jurisdiction to enter the order approving the Trustee's request to employ Petitioner as special counsel to prosecute the exempted state court case. By the Trustee's failure to act, the order was rendered void *ab initio*. This is a matter which is before the bankruptcy court in the pending bankruptcy case and the State Court was advised of same before it delivered its opinion. The bankruptcy court recently (on July 21, 2013) denied Petitioner's motion to vacate and motion for summary judgment in the adversary proceeding, but litigation continues there on these issues and others relevant to this lawyer disciplinary proceeding.

In response to this argument, the State Court stated:

> **Whether Mr. Trumble had any authority to assert control over Ms. Miller's interest in her case is irrelevant to the formation of an attorney-client relationship in this case for the reasons already stated.** This issue goes to the liability of Mr. Trumble and Mr. Nace, and as such, it

> is outside of the jurisdiction of this Court. [Emphasis added.]

(App.26.)

Again, the State Court misconstrued that the only way an attorney-client relationship could ever have been formed in this bankruptcy case was by entry of a legally valid order authorizing the Trustee to employ Petitioner under § 327(e). Petitioner repeatedly urged that, until the validity of the bankruptcy court order authorizing his appointment as special counsel is determined, there can be no holding by any court that an attorney-client relationship was formed with the Trustee or that he violated any legal or ethical duties to the Trustee, the court or the public.

Also, the State Court dismissed Petitioner's contention throughout the entirety of the state lawyer disciplinary proceeding that the Trustee wholly failed to fulfill his mandatory and nondelegable duties owed to special counsel as his supervising lawyer under 11 U.S.C. § 704 and the Handbook for Chapter 7 Trustees. Initially, the Board responded when it was asked to consider the Trustee's conduct as part of the state lawyer disciplinary proceedings, and said, "[t]he Hearing Panel Subcommittee makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter." (App.67.) However, the Board did clearly understand Petitioner's assertion as evidenced by its statement, "respondent [Petitioner] blames the Trustee

for failing to properly supervise *him* and failing to notify and contact *him*." [Emphasis in original.] (App.67.)

When the issue of the Trustee's misconduct was again raised by Petitioner before the State Court, it concluded that:

> In his brief to this court, Mr. Nace writes extensively on Mr. Trumble duties as trustee and how Mr. Trumble did not fulfill his responsibilities as trustee. While this court is not in a position to evaluate Mr. Trumble's responsibilities – the matter is not properly before the court – there is ample evidence that Mr. Nace as Mr. Trumble's attorney, had his own set of duties and responsibilities that he failed to perform. Mr. Trumble was Mr. Nace's client not the other way around.

(App.37.) The State Court clearly understood that Petitioner was claiming a procedural due process violation by the Board resulting from its decision to not consider the Trustee's misconduct and breach of mandatory duties in the context of the lawyer disciplinary proceeding. Confirmation of this understanding is seen in footnote 14 of the opinion.

> In his brief, Mr. Nace asserts,
>
> HPS' statement that it "makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter" reveals its refusal to objectively evaluate and consider Nace's legitimate, credible factual and legal defense

> in this most important matter. . . . Such action by the HPS is arbitrary and violates Nace's constitutional due process rights in providing a factual and legal defense to the charges and arguing same in mitigation.

The State Court further provided its holding concerning Petitioner's asserted constitutional due process violation:

> Mr. Trumble's misconduct, in the context of this proceeding, was not within the purview of the HPS. **The HPS did not violate Mr. Nace's due process rights in failing to examine Mr. Trumble's actions.** [Emphasis added.]

(App.37.)

Moreover, in the context of a state lawyer disciplinary proceeding based upon an allegation of negligence committed by the offending lawyer, the conduct of the other party, albeit Trustee, should always be evaluated and considered. This process is particularly applicable where states like West Virginia have adopted the common law doctrine of comparative negligence and also have decided to impose sanctions upon lawyers for allegations of ethical misconduct based upon simple negligence. *See, Lawyer Disciplinary Board* v. *Burke*, 230 W.Va. 158, 737 S.E.2d 55 (2012) (companion case to instant one.)

Also, in addition to refusing to consider the Trustee's misconduct and breach of duties under federal bankruptcy law, the State Court violated Rule

3.16, West Virginia Rules of Lawyer Disciplinary Procedure, by imposing a severe sanction upon Petitioner without first knowing the extent of the Trustee's interest in the debtor's property at issue and what portion of the state malpractice award would have been properly before the bankruptcy court. In this regard, the court said, "the harm to Mr. Trumble's interest, **while not completely definite at present** is also potentially great." [Emphasis added.] (App.35.) In footnote 13, the State Court said "[t]he bankruptcy court is the proper body to determine what portion of Ms. Miller's malpractice award Mr. Trumble should have received from Mr. Nace." (App.35.) In consideration of mitigation, the State Court also ignored the fact that Petitioner paid the amount claimed to be owed to creditors ($12,000.00) into the bankruptcy court prior to the hearing and argument in the lawyer disciplinary proceeding. (App.100.)

In summary, the State Court acknowledged Petitioner's specific bankruptcy law arguments that:

> Mr. Nace asserts that he was not Mr. Trumble's attorney for purposes of the application of the Rules of Professional Conduct. Specifically, Mr. Nace argues that he was not Mr. Trumble's attorney because (a) as trustee, Mr. Trumble had no right or authority to assert control over Ms. Miller's individual interest in the wrongful death medical malpractice case as Ms. Miller's interest was not an asset of the estate under 11 U.S.C. § 541; (b) the bankruptcy court lacked jurisdiction

> to enter the March 4, 2005, order appointing Mr. Nace as special counsel, and so the order is void *ab initio*; (c) Mr. Nace did not receive notice of the order appointing him special counsel resulting in a lack of mutual assent to the formation of an attorney-client relationship; and (d) a conflict of interest between Mr. Nace and the trustee, Mr. Trumble, existed that would prevent the formation of an attorney-client relationship.

(App.21-22.) These important federal bankruptcy law issues, in essence, Petitioner's federal bankruptcy law defenses, were cast aside in favor of the simplistic application of the state common law to decide the controlling issue of formation of the attorney-client relationship in this case. Without deep reflection on its admitted lack of jurisdiction of the federal questions presented, the State Court adopted the Board's recommendation and found Petitioner violated Rules 1.1, 1.3, 1.4(a) and 1.4(b), 1.15(b), 8.4(c) and 8.4(d), West Virginia Rules of Professional Conduct. (App.2-3.)

B. Petitioner's Practice and Activities

Petitioner is a lawyer who has practiced tirelessly for more than forty (40) years to protect the rights of injured persons. Until now, he has done so without any ethical stain or blemish. The founding member of Paulson & Nace, PLLC, 1615 New Hampshire Avenue, NW, Washington, D.C., Petitioner is a member of the Bars in the District of Columbia, Maryland,

Pennsylvania and West Virginia. He has served the profession, including Bench and Bar, in a number of ways. (App.88-89.)

Petitioner is a member of the American Law Institute, the American Board of Professional Liability Attorneys and the National Board of Legal Specialty Certification. He was President of ATLA (now, AAJ) in 1993 and served as President of the National Board of Trial Advocacy, the ABA-sponsored professional certifying agency for trial advocates. His other professional activities include serving as President of the Metropolitan DC Trial Bar and as an appointed member of the DC Court of Appeals Unauthorized Practice of Law Committee.

C. Summary of Relevant Facts from Lawyer Disciplinary Proceeding below

In 2004, Petitioner, in association with a West Virginia lawyer, agreed to evaluate a potential medical malpractice case arising from the death of Paul D. Miller. Following her husband's death, Barbara A. Miller initially retained a local lawyer in Martinsburg, West Virginia, to investigate her husband's wrongful death case. (App.93.) The local lawyer and Petitioner were long-time associates and served together as co-counsel in numerous medical malpractice cases together over a period of more than twenty (20) years. (App.94, 103-104.)

On September 24, 2004, while Petitioner was still in the early stages of investigating the medical malpractice wrongful death case, Mrs. Miller retained separate legal counsel and filed her Bankruptcy Chapter 7 Voluntary Petition, which was designated as a "no asset" case. (App.94.) The Bankruptcy Petition contained Schedule B-Personal Property and listed "Malpractice Suit in re: deceased husband (D. Michael Burke, Attorney)" as property of the Estate, with an "unknown" current market value of Mrs. Miller's interest in same. (App.94.) Mrs. Miller also filed Schedule C-Property Claimed as Exempt, which specifically exempted the "Malpractice Suit in re: deceased husband (D. Michael Burke, Attorney)" under the provisions of W. Va. Code § 38-10-4 and stated, "unknown" for both the value of the claimed exemption and the current market value of exempted property. (App.94.)

Mrs. Miller's meeting of creditors under 11 U.S.C. § 371 was held on October 21, 2004. (App.97.) It was known at that time that her interest in the medical malpractice wrongful death case of her husband's estate was limited by her status as a potential statutory distributee under the W. Va. Code § 56-7-6(b), the West Virginia Wrongful Death Act. (App.98-99.) Thus, her interest in estate property under 11 U.S.C. § 541 was likewise limited, at most, to a portion of the wrongful death proceeds if same were not otherwise exempt. (App.98-99.)

Mrs. Miller received her Section 727 discharge on December 21, 2004. (App.99.) At the time of discharge, no objection had been filed by the Trustee or by any creditor to the claimed exemption of the wrongful death case being investigated by Petitioner; and the 30-day period in which to do so, under Bankruptcy Rule 4003(b), had expired. (App.99-100.)

Following Mrs. Miller's discharge, even though the Trustee had never spoken to Petitioner concerning the medical malpractice wrongful death case he was investigating for the estate of Mrs. Miller's husband and knew little, if anything, about the potential value of the case, its chances of prevailing, or any of the expected time frames for the action, he designated Mrs. Miller's bankruptcy case as an asset case and requested the issuance of claim notices on January 11, 2005. (App.100.) The first contact between the Trustee and Petitioner was by correspondence dated January 27, 2005. (App.104.)

The Trustee's correspondence was sent by his legal assistant and included an application to employ special counsel, order and original affidavit. (App.104.) Upon the advice of his local counsel, Petitioner signed the documents and returned them to the Trustee for handling by letter dated February 24, 2005. (App.106.) Without hearing and without being advised of the significant errors in the affidavit and application submitted by the Trustee, the bankruptcy court, on March 4, 2005, entered the order authorizing the Trustee to employ Petitioner and his West

Virginia colleague as special counsel under 11 U.S.C. § 327(e). (App.108.)

Petitioner's correspondence of February 24, 2005, returning the signed affidavit, specifically advised the Trustee of the change in his office address as of March 5, 2005. (App.109.) However, the certificate of service created for the March 4, 2005 order shows that Mr. Nace was served by first class mail at the wrong address. (App.109-110.) In spite of Petitioner's written notification to the Trustee of his change of address, the Trustee did not advise any bankruptcy court personnel of said change and, consequently, Petitioner did not receive a copy of the entered order approving his employment as special counsel for the Trustee. (App.107-108.)

Importantly, Petitioner and his counsel argued throughout the entire lawyer disciplinary proceeding that Petitioner had never received a service copy of the order entered by the bankruptcy court on March 4, 2004, as it was served upon the incorrect address by the contractor employed by the bankruptcy court to provide such services. (App.110.) Thus, Petitioner never received any notice that said order had been entered.

The Trustee also testified in deposition testimony in the proceedings below that he never sent a copy of the order to Petitioner until the first time he corresponded with Petitioner in October of 2008, more than three and one-half years after entry of the order. (App.110-111.) It is important to note that there was

no contact whatsoever between the Trustee and Petitioner during the time (years) Mrs. Miller's bankruptcy case was pending. (App.111.)

There was never any attempt by the Trustee or anyone in his office to contact Petitioner from January 27, 2005, until October 10, 2008. (App.110-111.) When the Trustee finally attempted to do so by correspondence in October 2008, said correspondence was again sent to the wrong address. It was not until the Trustee's correspondence dated November 14, 2008, now sent to his correct address, that Petitioner first learned of the Trustee's inquiry and that the Trustee believed that Petitioner had not properly represented him in the bankruptcy case. (App.116-117.) Petitioner promptly responded to the Trustee's correspondence seeking information by letter dated December 1, 2008, and indicated his willingness to collect the information requested. (App.117.)

Specifically, Petitioner requested that the Trustee send him documentation supporting the assertions that he had been actually employed as special counsel in the Miller bankruptcy case. In spite of the obvious failure of communication and complete lack of understanding among the lawyers involved, the Trustee sent correspondence, dated January 5, 2009, directing Petitioner to place his legal malpractice carrier on notice and threatened that he "will be contacting the appropriate State Bars in which you are admitted to report your disregard for the Rules of Professional Conduct as it relates to the representation of me as Trustee with regard to this matter." (App.117.)

By correspondence dated February 4, 2009, Petitioner responded to the terse tone and aggressive and threatening statements made by the Trustee in his January 5, 2009 letter, and attempted to explain his understanding and knowledge of the events which had transpired over the years during his representation of Mrs. Miller as the personal representative in her deceased husband's state court medical malpractice wrongful death case. (App.117.)

The Trustee never responded to Petitioner's February 4, 2009 correspondence. Instead, he filed an ethics complaint with the Board on July 13, 2009, without first bringing the dispute to the bankruptcy court's attention or seeking any further information from Petitioner which could have been used to resolve the dispute. (App.117-118.) Ultimately, the claim made by the Trustee was that Petitioner was negligent in the performance of his duties as special counsel under § 327(e) and that he had failed to turn over proceeds potentially due Mrs. Miller's bankruptcy estate after a partial settlement and subsequent trial and verdict in the state court litigation.

THE REASONS FOR GRANTING THE PETITION

In *Tennessee Student Assistance Corp.* v. *Hood*, 124 S.Ct. 1905, 541 U.S. 440 (2004), this Court said, "Article I, § 8, cl. 4, of the Constitution provides that Congress shall have the power '[t]o establish . . . uniform Laws on the subject of Bankruptcies

throughout the United States.'" Pursuant to its grant, Congress enacted, among other bankruptcy statutes, 11 U.S.C. § 327(e), allowing an interim trustee, with the court's approval, to employ an attorney to represent him for a specified purpose.

In 28 U.S.C. § 1334(e)(2), Congress specifically empowered the district court with exclusive jurisdiction over "all claims and causes of action" of § 327(e) issues. No grant or reservation of jurisdiction was provided to any other court, thereby establishing the preeminence of jurisdiction to the district court and, through reference, to the bankruptcy court.

The State Court violated the Supremacy Clause, Article VI, cl. 2, when it disregarded the clear congressional jurisdictional mandate of § 1334(e)(2) and applied West Virginia common law in deciding the legal and ethical issues which arose in the dispute between the Trustee and Petitioner under § 327(e) in the pending bankruptcy case. For the State Court to have done so with knowing disregard for the applicable bankruptcy law violates the holding of *Sperry* v. *State of Florida ex rel. Florida Bar*, 83 S.Ct. 1322, 373 U.S. 379 (1963). Also, Petitioner asserts his procedural due process protections afforded in state lawyer disciplinary proceedings were also violated. *See, In re Ruffalo*, 88 S.Ct. 1222, 390 U.S. 544 (1968).

In summary, it is asserted that the State Court violated the Supremacy Clause and Petitioner's procedural due process rights when it refused to use reasonable restraint by allowing the bankruptcy

court to first determine all relevant legal and ethical issues in dispute between the Trustee and special counsel which, by necessity, must be construed and decided in the pending bankruptcy case under 11 U.S.C. § 327. It is asserted that the State Court has decided an important question of federal law in this case that has not been but should be settled by this Court.

I. THE STATE COURT LACKED SUBJECT MATTER JURISDICTION TO DETERMINE THE CLAIMS MADE AGAINST PETITIONER BY THE TRUSTEE ARISING FROM THEIR DISPUTE OVER ESTATE PROPERTY IN THE PENDING BANKRUPTCY CASE.

The argument that 28 U.S.C. § 1334(e)(2) deprives the State Court of jurisdiction to act, at least before the bankruptcy court acts in resolving disputes between Petitioner and the Trustee under § 327(e), has been presented for consideration by the State Court on three separate occasions. The issue of subject matter jurisdiction was first raised by Petitioner in the motion for stay, (App.171.), then, in the brief, (App.89, 123-125.), and, lastly, in the petition for rehearing. (App.159-161.)

Subject matter jurisdiction is exclusively vested in the United States District Court and by reference to the Bankruptcy Court pursuant to the provisions of 28 U.S.C. § 1334(e) and 28 U.S.C. §§ 151 and 157. Congress clearly expressed its intent for "all claims

and causes of action" of the kind presented in this case to fall under its mandatory jurisdictional enactment which states, in relevant part:

> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –
>
> . . .
>
> (1) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

For purposes of application of this broad, exclusive jurisdictional mandate, Petitioner asserts that the ethics complaint filed by the Trustee, as well as the legal malpractice civil action filed against him in the adversary proceeding, fall within and are encompassed by the clear and unequivocal language "over **all** claims or causes of action that involve construction of section 327." [Emphasis added.] This is especially true where, as here, both the ethics claim and the legal malpractice claim are based upon an assertion of negligence against Petitioner in the performance of his duties as special counsel under § 327.

It has been held that, "[a] professional may not be employed by a trustee without the court's approval." *In re French*, 139 B.R. 485 (Bkrtcy. S.D. S.D. 1992). It has also been held that a professional's employment in a bankruptcy case is limited to the employment approved in the order authorizing the

employment. *In re Computer Learning Centers, Inc.*, 285 B.R. 191, 205 (Bkrtcy. E.D. Va. 2002). The purpose of court controlled employment of professionals, "assures proper management of the case and the professionals." *Id.* at 205. *See also*, *In re New England Fish Co.*, 33 B.R. 413, 420 (Bkrtcy. W.D. Wash. 1983).

Therefore, only the bankruptcy court has the subject matter jurisdiction to determine the validity of its order authorizing the employment of Petitioner as special counsel to the Trustee. It, likewise, is the only court vested with jurisdiction to determine whether an attorney-client relationship was formed between these lawyers in the pending bankruptcy case and the extent of their respective legal and ethical duties in the performance of their roles as officers of the court.

A review of the opinion below leaves no question that the State Court was mindful of its lack of jurisdiction over the claims presented in each of the two cases involving these parties and their respective legal and ethical duties and responsibilities. It also knew, throughout the pendency of the state lawyer disciplinary proceeding, that the bankruptcy court had these issues before it. Yet, the State Court sidestepped the jurisdictional issue and asserted state constitutional authority to act and summarily held Petitioner had violated a number of state rules of professional conduct.

Clear demonstration of the State Court's lack of restraint is seen in reviewing the sanction it fashioned, which was also in violation of Rule 3.16, West Virginia Rules of Lawyer Disciplinary Procedure. The sanction imposed upon Petitioner was made without the primary bankruptcy factual and legal issues arising under § 327(e) being first resolved by the bankruptcy court. However, the sanction required "that he [Petitioner] satisfy any obligations imposed on him in the final disposition of the pending adversary proceeding in the United States Bankruptcy Court for the Northern District of West Virginia filed by the bankruptcy trustee. . . ." (App.38-39.) The stay of the lawyer disciplinary proceeding was sought to allow these determinations to be first made by the bankruptcy court before the State Court acted.

To hold that a practicing lawyer violated rules of professional conduct and to impose a severe sanction upon that lawyer without first allowing the bankruptcy court vested with exclusive jurisdiction to decide the legal and ethical issues owed by the lawyer under federal bankruptcy statutes is procedurally unsound. Then to require the lawyer to "satisfy any obligations imposed on him in the final disposition of the pending adversary proceeding," highlights the procedural infirmity of the state lawyer disciplinary proceeding below.

II. THE ETHICS COMPLAINT FILED BY THE TRUSTEE IN THE STATE LAWYER DISCIPLINARY PROCEEDING AND THE LEGAL MALPRACTICE COMPLAINT FILED IN THE ADVERSARY PROCEEDING ARE BOTH CORE PROCEEDINGS AS DEFINED BY CONGRESS IN 11 U.S.C. § 327(e) AND 28 U.S.C. § 157(b)(2)(A).

Congress defined "core proceeding" in 28 U.S.C. § 157(b)(2)(A) and stated:

> (2) Core proceedings include, but are not limited to –
>
> (A) matters concerning the administration of the estate.

Federal courts have uniformly held that the resolution of § 327(e) issues involving special counsel are core proceedings under § 157(b)(2)(A) within the bankruptcy court's exclusive jurisdiction of 28 U.S.C. § 1334(e)(2); *see In re Eckert*, 414 B.R. 404 (Bkrtcy. N.D. Ill. 2009).

In discussing § 157(b)(2)(A), the court, in *In re STN Enterprises, Inc.*, 73 B.R. 470 (Bkrtcy. D. Vt. 1987), said:

> While we appreciate that Congress intended, by its extremely comprehensive language in 28 U.S.C. §§ 157(b)(2)(A) and (O), for core proceedings to be applied as broadly as possible, we also acknowledge:
>
> > To be a core proceeding, an action must have as its foundation the creation,

> recognition, or adjudication of rights which would not exist independently of a bankruptcy environment although of necessity there may be a peripheral state law involvement. . . ."

There should be no pause in concluding in this case that all of the legal and ethical duties at the center of the dispute now pending in the bankruptcy court "would not exist independently of a bankruptcy environment" and that the state lawyer disciplinary proceeding is, at most, "a peripheral state law involvement" for purposes of application of 28 U.S.C. §§ 1334(e)(2) and 157(b)(2)(A).

III. THE HOLDING MADE BY THE STATE COURT THAT PETITIONER IS SUBJECT TO ITS DISCIPLINARY JURISDICTION VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court's precedent makes clear that practice before federal courts, including bankruptcy courts, is not governed by state court rules. The federal court has the power to control admission to its bar and to discipline attorneys who appear before it. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123 (1991). It is known that, "[b]ankruptcy courts also 'have the inherent power to sanction that Chambers recognize exists within Article III courts.'" *In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009).

State rules regulating attorney conduct are subject to operation of the Supremacy Clause. *County of Suffolk* v. *Long Island Lighting Company,* 710 F.Supp. 1407, 1414 (E.D.N.Y. 1989). *See also, Surrick* v. *Killion*, 449 F.3d 520, 531 (3d Cir. 2006). In *County of Suffolk*, the Court held, "[t]hus to the extent the enforcement of the state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement." 710 F.Supp. at 1415. In *Surrick*, the Court held,

> Under the Supremacy Clause, when state law conflicts or is incompatible with federal law, the federal law preempts the state law. Preemption generally occurs in three ways: (1) where Congress has expressly preempted state law; (2) where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; or (3) where federal law conflicts with state law.

Each of these categories of preemption is necessarily applicable in this case. Further, the State Court's actions usurping the bankruptcy court's authority and jurisdiction over Petitioner's conduct while acting as special counsel, and its application of state common law to determine that an attorney-client relationship was formed between the Trustee and Petitioner violate the Supremacy Clause of the United States Constitution. *See also, Sperry* v. *State of Florida*, 373 U.S. 379, 83 S.Ct. 1322 (1963).

It has been held that, "[a] federal court is not bound to enforce [a state court's] view of what constitutes ethical professional conduct." *County of Suffolk*, 710 F.Supp. at 1413; *see also*, *Figueroa-Olmo* v. *Westinghouse Elec. Corp.*, 616 F.Supp. 1445, 1449-50 (D.P.R. 1985); *Black* v. *Missouri*, 492 F.Supp. 848, 874-75 (W.D. Mo. 1980). The court, in *County of Suffolk*, also held, "the ethical standards imposed upon attorneys in federal court are a matter of federal law." *Id.* at 413 (*citing In re Snyder*, 472 U.S. 634, 643-45, n. 6, 105 S.Ct. 2874, 280-81, n. 6 (1985)).

This court held, in *In re Snyder*, 472 U.S. 634, 105 S.Ct. 2874 (1985) that, "[c]ourts have long recognized an inherent authority to suspend or disbar lawyers" [citations omitted]. The Court further stated, "[t]his inherent power derives from the lawyer's role as an officer of the court which granted admission." *Id.* at 643.

In *McCallum* v. *CSX Transportation, Inc.*, 149 F.R.D. 104 (M.D. N.C. 1993), the district court held that, "[t]he Supreme Court has made it clear beyond peradventure that a federal court's decision to admit to practice or discipline an attorney arises from an exercise of that court's inherent power" (*citing In re Snyder, supra*). The Court also said, "[f]urthermore, the standards which arise from exercise of that power must be found in federal law." *Id.* The *McCallum* Court further stated:

> Inasmuch as neither Congress nor the Supreme Court have adopted a uniform set of federal ethical standards governing attorneys practicing in the federal courts, the various federal courts may look to the rules of the state in which that court sits or widely accepted national rules, such as the American Bar Association (ABA) Model Rules of Professional Conduct. **If a district court has adopted disciplinary rules in its local rules, it naturally will consult them to determine the appropriate conduct.** [Emphasis added.]

Id. at 108. The District Court for the Northern District of West Virginia adopted a code of professional responsibility in its local rules. *See,* L.R. Gen. P. 84.01. This local rule applies to the bankruptcy court involved in the instant case as it is an adjunct to or unit of the district court.

The analysis applied by the *McCallum* court should be applied by the bankruptcy court here and requires, "[t]his court must look to federal law in order to interpret and apply those rules." *Id.* at 108. It concluded its analysis by stating, "[t]hat is, even when a federal court utilizes state ethics rules, it cannot abdicate to the state's view of what constitutes professional conduct, even in diversity cases" [citations omitted]. Therefore, "[w]hile this Court has adopted the [West Virginia] professional code as its code of conduct, it still must look to federal law for interpretation of those canons and in so doing may consult federal case law and other widely accepted

national codes of conduct, such as the ABA Model Rules." *Id.* at 108. Therefore, the refusal of the State Court to acknowledge the preeminence of the bankruptcy court's exclusive jurisdiction under 28 U.S.C. § 1334(e)(2) to decide the relevant legal and ethical issues presented in this case constitutes a clear violation of the Supremacy Clause and due process.

IV. THE STATE COURT VIOLATED THE SUPREMACY CLAUSE AND PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS WHEN IT HELD THAT STATE COMMON LAW CONTROLLED THE DETERMINATION THAT AN ATTORNEY-CLIENT RELATIONSHIP WAS FORMED BETWEEN TRUSTEE AND PETITIONER IN THE STATE LAWYER DISCIPLINARY PROCEEDING.

This Court in *Cipollone* v. *Ligget Group, Inc., et al.*, 112 S.Ct. 2608, 505 U.S. 504 (1992) said, "Article VI of the constitution provides that the laws of the United States 'shall be the supreme law of the land; . . . anything in the constitution or laws of any state to the contrary notwithstanding.'" *Id.* at 516. This Court further stated that, "it has been settled that state law that conflicts with federal law is 'without effect.'" (*Citing Maryland* v. *Louisiana*, 451 U.S. 725, 101 S.Ct. 2114 (1981).)

This Court previously applied these principles in the case of *Sperry* v. *State of Florida ex rel. Florida Bar*, 373 U.S. 379, 83 S.Ct. 1322 (1963), when it

considered the preemptive effect of federal law on Florida's regulation of the unauthorized practice of law by a person registered to practice before the United States Patent Office. In *Sperry*, this Court said, "but the law of the state, though enacted in the exercise of powers not controverted, must yield" where incompatible with federal legislation." *Id.* at 384. This Court also said,

> Finally, regard to the underlying considerations rendered it difficult to conclude that Congress would have permitted a State to prohibit patent agents from operating within its boundaries had it expressly directed its attention to the problem. The rights conferred by the issuance of letters patent are federal rights. It is upon Congress that the Constitution has bestowed the power . . . to take all steps necessary and proper to accomplish that end. . . .

Id. at 400-401.

As to application of the Supremacy Clause and the preemptive effect of federal law in this case, the Court also said, "the authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary. . . ." *Id.* at 403. Therefore, application of the principles learned from careful analysis of the holdings in *Cipollone* and *Sperry* to the undisputed facts here leads to the conclusion that 11 U.S.C. § 327(e) preempts state common law relied upon by the State

Court in deciding that an attorney-client relationship was formed between special counsel and the Trustee.

The importance of considering the federal statutory scheme permitting the Trustee to employ special counsel cannot be overstated. The State Court, in ignoring the federal bankruptcy laws, applied state common law in analyzing and sanctioning Petitioner under ethical rules that govern an attorney-client relationship. However, an analysis of the case under federal bankruptcy law clearly demonstrates that the relationship between the trustee and special counsel is not one of attorney-client, but rather one of supervising lawyer and subordinate. Had the State Court considered federal bankruptcy law as required, it would have reached this conclusion. The importance is that West Virginia's Rules of Professional Conduct are different for lawyers supervising other lawyers. *See* Rule 5.1, West Virginia Rules of Professional Conduct. The State Court's failure to properly consider the statutory scheme permitting a Trustee to employ special counsel resulted in Petitioner's alleged conduct being considered under the wrong ethical rule.

V. THE STATE COURT VIOLATED PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS PROTECTED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN IT WHOLLY DISREGARDED THE TRUSTEE'S MISCONDUCT AND BREACH OF DUTIES UNDER FEDERAL BANKRUPTCY LAW, AND IMPOSED A SEVERE SANCTION UPON HIM IN DEPRIVATION OF HIS CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS IN HIS LAW LICENSE BY ACTING BEFORE THE NECESSARY LEGAL AND FACTUAL ISSUES ARISING UNDER § 327(e) WERE DECIDED BY THE BANKRUPTCY COURT IN THE PENDING CASE.

Procedural due process requires Petitioner be given the opportunity to be heard at a meaningful time and in a meaningful way, and the opportunity to present evidence and have it fairly judged. *See, Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1992); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *see also, In re Ruffalo*, 390 U.S. 544 (1968). The State Court violated Petitioner's procedural due process rights when it failed to consider the acts and negligent conduct of the Trustee in failing to supervise him and failing to communicate effectively with him prior to and after the entry of the March 4, 2005 Order. (App. 165-166.)

Had the State Court fairly considered Petitioner's evidence and arguments as to the Trustee's duty

to supervise special counsel arising under the federal bankruptcy law, it would have concluded that Rule 5.1, West Virginia Rules of Professional Conduct, applied to this case. Petitioner's evidence in support of this argument derived from and was confirmed by the Trustee's testimony in the underlying state lawyer disciplinary proceeding that 11 U.S.C. § 704 and the Handbook for Chapter 7 Trustees fairly articulated his duties applicable to the instant case.

When evaluating the various duties, including the ones of supervision, communication and management of special counsel, it should be concluded that the Trustee serves a role more like that of a supervising lawyer and manager of the special counsel rather than his "client." The Trustee also had the right to and authority to bring to the bankruptcy court's attention any problem or issue which arose with regard to the litigation proceeds and could have done so by way of a motion to turn over property under 11 U.S.C. § 522. Instead, the Trustee used the ethics complaint to secure the litigation proceeds he desired to be brought within the debtor's estate. (App.118.) The State Court also violated Petitioner's procedural due process rights when it failed to fairly judge, weigh and consider all of the mitigating factors established by the evidence presented in this lawyer disciplinary proceeding.

Further as noted above, the State Court imposed a severe sanction upon Petitioner without having before it any ruling from the bankruptcy court on the issues raised in mitigation. Specifically, Petitioner

was punished severely without the bankruptcy court's having first determined the validity of its order approving his employment as special counsel, the nature and extent of the trustee's interest in the litigation proceeds, and the extent of harm, if any, caused by any act committed by Petitioner. No consideration was given either to Petitioner's actions in depositing a disputed sum into court. (App.150.)

In spite of citing to the Rule 3.16 factors considered to be in mitigation of the sanction, the State Court proceeded without waiting until the bankruptcy court decided these issues in the pending bankruptcy case. (App.142-143.) This conduct highlights the significance of the State Court's refusal to grant the stay requested by Petitioner before it proceeded to receive briefs, heard argument and rendered its opinion in the instant state lawyer disciplinary proceeding.

VI. THE TRUSTEE EXCEEDED HIS POWER AND AUTHORITY TO ACT WHEN HE FILED THE ETHICS COMPLAINT AGAINST PETITIONER.

It is recognized by federal courts that a "Chapter 7 trustee is an officer of the court." *See, In re Grand Jury Proceedings*, 119 B.R. 945 (E.D. Mich. 1990). In *Matter of Evangeline Refining Co.,* 890 F.2d 1312, 1323 (5th Cir. 1989), the court held, "when persons perform duties in the administration of the bankruptcy estate, they act as 'officers of the court and not

private citizens.'" *Citing Callahan* v. *Reconstruction Finance Corp.*, 297 U.S. 464, 468, 56 S.Ct. 519 (1935). The court in *Evangeline Refining Co.* stated also that, "as such, trustees and attorneys for trustees are held to high fiduciary standards of conduct." *Id.* at 1323.

In *Cissel* v. *American Home Assur. Co.*, 521 F.2d 790 (6th Cir. 1975), the court held, "the trustee is a creature of statute and has only those powers conferred thereby." *Id.* at 792. *See also, In re Benny*, 29 B.R. 754, 760 (N.D. Ca. 1983). The Trustee's limited enumerated powers are specifically defined by 11 U.S.C. §§ 704 and 541. Such enumerated powers do not include the right to file state legal ethics charges against special counsel appointed under 11 U.S.C. § 327(e). In essence, he lacks legal standing to file the ethics complaint in state court. *See, O'Halloran* v. *First Union Nat'l Bank*, 350 F.3d 1197, 1202 (11th Cir. 2003); *Official Committee of Unsecured Creditors of PSA, Inc.* v. *Edwards*, 437 F.3d 1145 (2006); *In re Beach First Nat. Bancshares, Inc.*, 702 F.3d 772 (4th Cir. 2012) (trustee acquires no rights or interests greater than those of debtor under § 541 and only has standing to assert any cause of action which debtor could have brought). The exclusive jurisdiction for such action is the United States Bankruptcy Court under 28 U.S.C. § 1334(e)(2), not this lawyer disciplinary proceeding.

In elevating the state law ethical duty to report another lawyer's violations of the West Virginia Rules of Professional Conduct to the Board, the State Court failed to consider the limitation placed by Congress

on the Trustee's express enumerated duties set forth in 11 U.S.C. § 704. The State Court noted in its opinion that under Rule 8.3(a), West Virginia Rules of Professional Conduct:

> [A]n attorney in West Virginia, Mr. Trumble had an affirmative duty to inform the ODC of his belief that Mr. Nace had committed violations of the Rules of Professional Conduct. . . . The duty to report is independent of Mr. Trumble's position as trustee; the duty arises from his membership in the West Virginia bar. Therefore, we conclude that this disciplinary proceeding is properly before this Court.

This conclusion violates the express limitations placed by Congress upon the Trustee's ability to act under federal bankruptcy law. Consequently, the Supremacy Clause and the broad concept of federalism were violated by the State Court when it held that the Trustee's state law duty superseded his limited federal authority to act in a federal bankruptcy matter. Therefore, this lawyer disciplinary proceeding as it is now procedurally postured is constitutionally defective.

CONCLUSION

It is respectfully requested that the Petition be granted or, in the alternative, the opinion of the Supreme Court of Appeals be summarily reversed with instructions to stay the state lawyer disciplinary

proceeding until such time as the substantive issues involved in this case are decided in the United States Bankruptcy Court for the Northern District of West Virginia in the pending bankruptcy case.

Respectfully submitted,

J. MICHAEL BENNINGER
BENNINGER LAW, PLLC
154 Pleasant Street
Morgantown, West Virginia 26505
(304) 241-1856
mike@benningerlaw.com

Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2013 Term

No. 11-0812

LAWYER DISCIPLINARY BOARD,
Petitioner

v.

BARRY J. NACE,
Respondent

Lawyer Disciplinary Proceeding

LICENSE SUSPENDED AND
OTHER SANCTIONS IMPOSED

Submitted: February 19, 2013
Decided: March 28, 2013

Jessica H. Donahue Rhodes, Esq.
Office of Disciplinary Counsel
Charleston, West Virginia
Counsel for the Petitioner

J. Michael Benninger, Esq.
Benninger Law
Morgantown, West Virginia
Counsel for the Respondent

The Opinion of the Court was delivered PER CURIAM.

Per Curiam:

This lawyer disciplinary proceeding was brought against Barry J. Nace ("Mr. Nace") by the Lawyer Disciplinary Board ("LDB"). The complaint giving rise to this action alleged ethical misconduct on the part of Mr. Nace and another attorney, D. Michael Burke ("Mr. Burke"). In our last term of Court, we decided *Lawyer Disciplinary Board v. Burke,* ___ W. Va. ___, 737 S.E.2d 55 (2012), adopting the sanctions recommended by the LDB and admonishing Mr. Burke for committing ethics violations. Upon an evidentiary hearing conducted by the Hearing Panel Subcommittee ("HPS") on October 10, 2011, the LDB found that Mr. Nace violated the West Virginia Rules of Professional Conduct, specifically Rules 1.1, 1.3, 1.4(a) and 1.4(b), 1.15(b), 8.4(c) and 8.4(d). The LDB, pursuant to the HPS's proposal in its March 21, 2012, report, recommends that Mr. Nace be suspended from the practice of law for 120 days without any requirement for reinstatement; that he provide community service through pro bono work for a total of 50 hours; that he satisfy any obligations imposed on him in the final disposition of the pending adversary proceeding in the United States Bankruptcy Court for the Northern District of West Virginia filed by the bankruptcy trustee, Robert W. Trumble ("Mr. Trumble"); and that he be ordered to pay the costs of the proceedings before the HPS pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

After a thorough review of the record presented for consideration, the briefs, the legal authorities

cited, and the arguments of the LDB and Mr. Nace, we find that Mr. Nace has committed ethics violations, and we impose the sanctions against him as recommended by the HPS.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The respondent, Barry J. Nace, has been practicing law since 1970. He has been a member of the West Virginia State Bar for more than 15 years, having been admitted to the Bar on March 19, 1997. He has also been admitted to practice law in Maryland, Pennsylvania, and the District of Columbia. Mr. Nace's practice is in Washington, D.C., with the law firm Paulson & Nace.

On February 5, 2004, Mr. Burke was hired by Barbara Ann Miller ("Ms. Miller") to represent her in a medical malpractice case involving her deceased husband. Shortly thereafter, Mr. Burke contacted Mr. Nace concerning the case. This was common practice with Mr. Burke and Mr. Nace; during their 20-year professional relationship, they had previously worked together on numerous medical malpractice cases. At Mr. Burke's request, Mr. Nace began evaluating Ms. Miller's case.

Later that year, on September 27, 2004, Ms. Miller filed a Chapter 7 Voluntary Petition in the United States Bankruptcy Court in the Northern

District of West Virginia.[1] Mr. Trumble was appointed as Interim Trustee of the bankruptcy estate. An order discharging Ms. Miller was entered on December 21, 2004.

On January 11, 2005, Mr. Trumble wrote to Mr. Burke to advise him that he, Mr. Trumble, had been appointed trustee of Ms. Miller's bankruptcy estate. Additionally, Mr. Trumble requested a valuation of the medical malpractice case in which Mr. Burke was representing Ms. Miller. Mr. Burke replied by letter dated January 25, 2005, that the medical malpractice claim was being reviewed by Mr. Burke's co-counsel, Mr. Nace, and that a valuation of the case could not be made prior to the completion of a medical review.

Mr. Trumble proceeded to send Mr. Burke and Mr. Nace separate letters on January 27, 2005, containing applications to employ special counsel, proposed orders authorizing the trustee to employ special counsel, and affidavits for both men to sign to accept employ as special counsel for the bankruptcy estate by the trustee, Mr. Trumble. The letter to Mr. Nace, signed by Kristi M. Hook, Certified Legal Assistant, on behalf of Mr. Trumble, stated, in part,

> Mr. Nace:
>
> Enclosed please find a copy of an Application to Employ Special Counsel, Order and

[1] Ms. Miller was represented by attorney William A. O'Brien in that proceeding.

> an original Affidavit with regard to your appointment as special counsel in the referenced matter. I request that you review the enclosed documentation and if the same meets with your approval, please sign the Affidavit in the presence of a Notary Public and return it to me along with a copy of your Contingency Fee Agreement. Upon receipt of the same, I will transmit the documentation to the Bankruptcy Court for approval.

The affidavit sent to Mr. Nace stated, in part, "I, Barry J. Nace, Esquire, declare: . . . That I am willing to accept employment by the Trustee on the basis set forth in the Application to Employ filed simultaneously herewith. . . . I declare under penalty of perjury that the foregoing is true and correct." Both Mr. Burke and Mr. Nace signed and returned the affidavits to Mr. Trumble.

On March 3, 2005, Mr. Trumble filed the applications for the authorization to employ Mr. Burke and Mr. Nace as special counsel, and by order this request was granted the following day in the bankruptcy court. Mr. Nace denies having received notice that the order issued, stating that it was mailed to the incorrect address.[2] The LDB asserts that the bankruptcy

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[2] Mr. Nace stated in his May 24, 2011, deposition testimony that his office had moved to a new location in March of 2005. The address to which the court mailed the March 4, 2005, notice of the entry of the order was Mr. Nace's former address. In the same deposition, Mr. Nace answered in the affirmative when asked if he had left a forwarding address for the post office, but

(Continued on following page)

court's records indicate that the mailed notice was not returned to the court as incorrectly addressed or undeliverable.

A complaint was filed on Ms. Miller's medical malpractice claim in the Circuit Court of Berkeley County, West Virginia, on June 17, 2005. The complaint named multiple defendants. On July 25, 2005, Mr. Burke notified Ms. Miller that he was withdrawing from her case because of a conflict of interest, but that Mr. Nace would continue to serve as her counsel in the matter. Mr. Burke did not provide the bankruptcy court or Mr. Trumble with notice of his withdrawal as counsel, nor did he submit a motion to withdraw.

In September of 2006, a partial settlement was reached with one of the defendants named in Ms. Miller's medical malpractice suit. The settlement totaled $75,000. Following the settlement, Mr. Nace wrote to Ms. Miller on September 26, 2006, stating, "[P]resumably you have a bankruptcy attorney and if so that person should call me so I know whether or not a check can be written to you." Mr. Nace now avers that he does not remember following up with Ms. Miller or her bankruptcy attorney. The proceeds of the settlement were distributed without the approval, authority, or knowledge of the bankruptcy estate's trustee, Mr. Trumble.

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he did not know how long mail was forwarded to the new address.

On October 30, 2006, Ms. Miller's case proceeded to jury trial against the remaining defendants. The jury returned a verdict awarding judgment in Ms. Miller's favor in the amount of $500,000, and judgment was entered on January 4, 2007. Mr. Burke did not participate in the trial of the case, nor did he participate in the subsequent appeal.[3] The proceeds from the trial were paid out to Ms. Miller, again without the approval, authority, or knowledge of Mr. Trumble.

On July 27, 2007, Mr. Trumble sent a letter to Mr. Burke requesting an update on the status of Ms. Miller's medical malpractice claim. Mr. Burke's records indicate that on August 8, 2007, Mr. Burke forwarded this letter to Mr. Nace's office by faxing and mailing the same. The "Fax Cover Memorandum" from Mr. Burke's office was marked as having been delivered to "Gabriel" from "Lacy" on August 8, 2007. Lacy Godby was Mr. Burke's secretary, and Gabriel Assaad was an associate in Mr. Nace's office. Mr. Burke also phoned Mr. Trumble's office and left a message with Mr. Trumble's assistant that he was no longer representing Ms. Miller and to contact Mr. Nace's office. Mr. Nace denies receiving a copy of the July 27, 2007, letter, or the message left by Mr. Burke.[4]

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[3] This Court refused the appeal by an order entered on February 12, 2008.

[4] In his brief to this Court, Mr. Nace maintains that "Assaad never worked on Miller's husband's case" and that

(Continued on following page)

On March 5, 2008, Mr. Nace sent Ms. Miller a check for $220,467.45 which represented Mr. Nace's calculation of her share from the proceeds of the medical malpractice case. Again, the distribution of these proceeds was made without the approval, authority, or knowledge of Mr. Trumble.

On October 10, 2008, Mr. Trumble sent letters to Mr. Burke and Mr. Nace advising that he had become aware of the resolution of Ms. Miller's case but that he had not received notice of the resolution, nor had he received the bankruptcy estate's portion of the proceeds from the case. This letter was not sent to Mr. Nace's correct address. A second letter, sent to Mr. Nace's correct address, was mailed on November 14, 2008. This letter requested settlement documents referred to in the October 10, 2008, letter. Mr. Nace responded to this letter on December 1, 2008, stating that he did not receive the October 10, 2008, letter and "that there was not any settlement and that the case was tried to jury verdict and then went on appeal and reported by the Court of Appeals when they declined to accept the defendants' petition." He also said, "I am not sure why you would expect us to contact you to obtain authority as to a settlement since there was no settlement."

"there was nothing seen or recovered from a review of Nace's file to indicate that Assaad received and filed the documentation or brought it to Nace's attention."

Mr. Trumble replied by letter to Mr. Nace on January 5, 2009, stating that Mr. Nace had been hired to represent the trustee's interest in the medical malpractice action regardless of the case being settled, tried before a jury, or resolved on appeal. Furthermore, Mr. Trumble advised that Mr. Nace had violated his duty to his client, Mr. Trumble, and asked that Mr. Nace put his malpractice carrier on notice.

Mr. Nace wrote back to Mr. Trumble on February 4, 2009, denying that he had ever received the application for employ of special counsel, the order authorizing Mr. Trumble to employ special counsel, or the order authorizing his appointment as special counsel until receiving Mr. Trumble's January 5, 2009, letter. He further stated that he had not heard anything from Mr. Trumble since signing the affidavit in February 2005.

Mr. Trumble filed an ethics complaint against Mr. Nace on July 13, 2009. The Office of Disciplinary Counsel ("ODC") notified Mr. Nace of the complaint by letter dated July 16, 2009. By letter dated August 25, 2009, Mr. Nace responded to the ODC's letter. In this letter, he wrote, in part,

> 11. On January 27, 2005, Mr. Trumble, through his certified legal assistant sent a letter to me and Mr. Burke asking us to sign an affidavit.

12. I did so, routinely, and saw no other document nor heard anything else about the matter.

13. *Apparently* Mr. Trumble filed a trustee application to employ special counsel.

14. I did not receive a copy of the trustee application to employ special counsel, which I subsequently learned existed.

(Emphasis in original).

On October 5, 2010, Mr. Trumble filed a complaint against Mr. Burke and Mr. Nace in the United States Bankruptcy Court for the Northern District of West Virginia alleging breach of contract and legal negligence as to the proceeds from the medical malpractice case.[5]

Pursuant to an investigative subpoena duces tecum, Mr. Nace attended a hearing before the Investigative Panel of the LDB on April 7, 2010. Mr. Nace appeared before the Investigative Panel of the LDB in Charleston, West Virginia, and gave a sworn statement. Again, he denied receiving the application to employ special counsel along with the affidavit sent by Mr. Trumble on January 27, 2005:

> Q And he [Mr. Trumble] said you did receive the application to employ special counsel along with the affidavit –

[5] The bankruptcy proceeding has been stayed pending the outcome of this case. Mr. Nace has filed a motion to lift the stay, but as of January 25, 2013, the stay has not been lifted.

. . . .

Q And you're saying [late 2008 was] the first time you saw those?

. . . .

A [Mr. Nace] I can't tell you exactly when, but I can say without any question whatsoever in my mind that the first time I saw [them] was when those letters in November or December of '09 started floating around.

Also during the April 7, 2010, hearing, Mr. Nace denied that he knew Ms. Miller was involved in a bankruptcy proceeding at the time he distributed the $75,000 settlement. He said,

I didn't know anything about Trumble. I really didn't. I didn't know about a bankruptcy at that point [at the time the $75,000 settlement proceeds were distributed], other than that affidavit that I signed, and I never heard from anybody on that whole thing.

. . . .

Yeah, I mean – I mean, in all honesty, I don't sit around calling up people saying, "How's your bankruptcy been going?" that I don't have any knowledge of.

You know, I didn't – if I had gotten a copy of the order, here's the – if I had gotten a copy of that order, then the lights might have gone off. . . .

In his brief to this Court, Mr. Nace writes, "Nace does not deny he was made aware of Miller's bankruptcy filing in February 2005 when he received and signed the Affidavit sent to him by Mr. Trumble's office."

The subpoena, which commanded his appearance on April 7, 2010, also ordered that Mr. Nace produce certain documents. Specifically, the subpoena requested "your complete client file relating to your representation of Robert W. Trumble, including financial records." During that appearance, he was questioned as follows:

> Q Okay. And did you bring your client files with you?
>
> A [Mr. Nace] I brought – well, my client files are about four boxes. So I brought everything that I thought would be relevant to this issue.
>
> Q And did you make copies? Are those copies for us?
>
> A You can have them, yes.

Mr. Nace provided the LDB with documents which, in all, totaled approximately 90 pages.

A little over a year and a half later, on October 10, 2011, a hearing was held before the HPS.[6] Mr.

[6] The HPS granted a motion to allow Mr. Burke and Mr. Nace's proceedings to be heard simultaneously. The HPS also denied Mr. Nace's motion to dismiss the ethics complaint against him.

Burke, Mr. Nace, and Mr. Trumble testified at the hearing, and exhibits were submitted. At the hearing, Mr. Nace was asked why he signed the affidavit:

> Q . . . So did you read that application before you signed this affidavit?
>
> A [Mr. Nace] No.
>
> Q And why did you sign a document stating that you were accepting employment on the basis of something that you had not seen?
>
> A Because I recall calling up Mr. Burke and asking about this. "I have this affidavit." And basically he said to me, "Well, you have to sign that and send it back." I said, "Okay."
>
> . . . .
>
> Mr. Burke asked me to sign this because it was something that had to be done, and I did it. And I was satisfied if Mike thought I should do it, I'd do it. I had faith in Mike, so I signed it and sent it back.

It was at this same hearing that Mr. Nace reported to the HPS that, contrary to the assertions he had made to the LDB for more than 24 months, he had received the application to employ special counsel and the proposed order attached to Mr. Trumble's January 27, 2005, letter:

> Q And did you receive the things that were attached to [the January 27, 2005, letter], the copy of the application, the order and the original affidavit?

A [Mr. Nace] It's my recollection that I received the affidavit to sign. When Mr. – my attorney was down there with me in Washington going through the record – going through the boxes of records, he found, I believe, an unsigned application and also – I think that's it. And a proposed order that we've seen since then. But I do not recall seeing that, and I did not have that in my file.

Q So you're saying you didn't receive that or you're saying you don't remember receiving those items?

A I'm saying I do not ever recall seeing anything other than this letter and the affidavit.

Mr. Nace's filing practices for documents related to bankruptcy were also discussed:

Q Okay. You do admit though that you have a copy of the signed affidavit, correct?

A [Mr. Nace] Yes.

. . . .

Q So you never would have put that into her medical malpractice case? . . . And you didn't have a section for bankruptcy?

A I wouldn't have had a section for bankruptcy under any circumstances. It was never – bankruptcy was never on my radar for anything, really, in my practice in 40 years.

> We didn't ask people if they were in bankruptcy or had been in bankruptcy. It was not one of the questions that we ask. . . .
>
> Q Well, would you have asked Ms. Miller about it since you signed that affidavit?
>
> A No. In fact, when I signed the affidavit I probably didn't meet Ms. Miller for many months after that.

Additionally, Mr. Nace was questioned at the hearing as to why he did not produce for the ODC the September 26, 2006 letter from him to Ms. Miller, which was ultimately discovered in Mr. Burke's files:

> CHAIRPERSON KILGORE: Well, what I'm getting at, Mr. Nace, I mean, you provided ODC with the disbursement statement and the settlement statement to Ms. Miller for the 75,000, the check and the disbursement statement for the verdict and the settlement of the verdict also, but not this letter.
>
> [Mr. Nace]: Well, there's a lot of things I didn't provide, lots of things. Because I wasn't – and I said, "Is there anything else that you want?"
>
> CHAIRPERSON KILGORE: Well, she wouldn't know about this letter, would she?
>
> [Mr. Nace]: No. You can see what I took down, which is about that thick. And I offered – I told her at the time I have files that are many, many, many files. "Is there

> anything else you want? You let me know whatever it is." If anybody asked for the entire file, they could have had it.
>
> But I flew from Dulles to Charleston and I wasn't taking all of that with me. I just took some things that I thought might be appropriate. And if she wanted anything else, I told her to ask me for it and tell me what you want. I didn't hear anything else until the charges were brought.

In an affidavit signed two days after the hearing, October 12, 2011, Mr. Nace explained, "As I had never represented Robert W. Trumble, I had no 'complete client file' relating to any representation of Robert W. Trumble, including financial records."[7] He continued, "To be sure, the [ODC] did not request my 'entire file' on the Miller matter. . . . Nevertheless, I, in good faith, took some records to the Appearance, including financial records from the Miller case." He proceeded, "Indeed, the questions by the [LDB] and the subpoena requests, in retrospect, were clearly inartful. That, however, is not my fault." Furthermore, he stated, "It has been explained . . . that 'Lacy' apparently made a copy of [the letter] and placed it in Michael Burke's file. There is no reason for her to do and she should not have done it."

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[7] At the October 10, 2011, hearing Mr. Nace expounded that he did not maintain a bankruptcy section in Ms. Miller's file in which to keep copies of his correspondence with Mr. Trumble.

Also at the October 10, 2011, hearing, Mr. Nace was questioned about why he did not follow up with Mr. Trumble after signing the affidavit. He replied,

> I don't know why I would have, first of all. I signed it. I admit that I signed it. But then it was out of my mind once I decided to get in the case and I worked on the case. That's what I did, I worked on the case.
>
> And I never heard another word from my boss, as I understand it to be, Mr. Trumble. I never heard another word from him, the person who is supposedly, according to the Code, as I now understand it, supervising and watching everything that I did and consulting with me, his so-called employee under the Code, and so I never heard of anything. I never had anything to do with the man.

Following the hearing, the HPS dismissed the charges against Mr. Nace as to any violation of Rule 1.5(a)[8] of the Rules of Professional Conduct. The HPS

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[8] **Rule 1.5. Fees**.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(Continued on following page)

found by clear and convincing evidence that Mr. Nace had violated Rules 1.1, 1.3, 1.4(a) and 1.4(b), 1.15(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct.[9]

Upon its finding that Mr. Nace violated the Rules, the HPS recommended the following sanctions: (1) that Mr. Nace be suspended from the practice of law for 120 days without any requirement for reinstatement; (2) that Mr. Nace provide community service through pro bono work for a total of fifty (50) hours; (3) that Mr. Nace satisfy all obligations imposed on him in any final disposition of the pending adversary proceeding filed by the bankruptcy trustee; and (4) that Mr. Nace be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

On April 24, 2012, Mr. Nace filed a notice of removal to the United States District Court for the Northern District of West Virginia. This Court entered an

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(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services, and;

(8) whether the fee is fixed or contingent.

(In part).

[9] The text of each of these rules is provided *infra* Part III.C.

order staying this disciplinary proceeding on May 7, 2012. On November 7, 2012, the district court ordered that the case be remanded. This Court then proceeded to place the case on the argument docket. Mr. Nace appealed the district court's order to the Fourth Circuit on November 21, 2012, and filed an additional motion to stay with this Court. The Court did not act on the motion to stay, and the appeal to the Fourth Circuit was dismissed on January 25, 2013.

II.

STANDARD OF REVIEW

The LDB is responsible for investigating complaints alleging ethics violations.

> "In an attorney disciplinary proceeding based on a complaint charging professional misconduct and prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for publicly reprimanding the attorney and for suspending the license of the attorney to practice law, the burden is on the committee to prove the charges contained in the complaint by full, clear and preponderating evidence." Syl.Pt. 2 of *Committee on Legal Ethics v. Daniel,* 160 W.Va. 388, 235 S.E.2d 369 (1977).

Syl. pt. 1, *Committee on Legal Ethics v. Blair,* 174 W. Va. 494, 327 S.E.2d 671 (1984). Although the LDB may make recommendations based on its investigations, "[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions

about public reprimands, suspensions or annulments of attorneys' licenses to practice law." *Id.* at syl. pt. 3.

The standard of review in lawyer disciplinary cases is well settled:

> "A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syllabus point 3, *Committee on Legal Ethics v. McCorkle,* 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 2, *Lawyer Disciplinary Bd. v. Morgan,* 228 W. Va. 114, 717 S.E.2d 898 (2011). Mr. Nace challenges the LDB's finding that he violated any duty to Mr. Trumble, and accordingly, he alleges that he did not act in such a manner as to warrant sanctions. Mr. Nace also challenges this Court's jurisdiction over this disciplinary proceeding. We will proceed by applying a *de novo* standard of review to these legal questions.

III.

ANALYSIS

In challenging the HPS's recommended sanctions, Mr. Nace presents numerous defenses relating primarily to whether Mr. Nace had formed an attorney-client relationship with Mr. Trumble, and if he did, whether the Court has jurisdiction to determine whether Mr. Nace committed ethics violations. Additionally, Mr. Nace challenges the HPS's findings that he violated the Rules of Professional Conduct and the recommended sanctions. For the reasons discussed below, we find that Mr. Nace did form an attorney-client relationship with Mr. Trumble and that the Court does have jurisdiction to determine whether Mr. Nace committed ethics violations. Furthermore, we agree with the HPS's findings that Mr. Nace violated the Rules of Professional Conduct, and accordingly, we believe sanctions are appropriate.

A. Attorney-client relationship

Mr. Nace asserts that he was not Mr. Trumble's attorney for purposes of the application of the Rules of Professional Conduct. Specifically, Mr. Nace argues that he was not Mr. Trumble's attorney because (a) as trustee, Mr. Trumble had no right or authority to assert control over Ms. Miller's individual interest in the wrongful death medical malpractice case as Ms. Miller's interest was not an asset of the estate under 11 U.S.C. § 541; (b) the bankruptcy court lacked jurisdiction to enter the March 4, 2005, order

appointing Mr. Nace as special counsel, and so the order is void *ab initio*; (c) Mr. Nace did not receive notice of the order appointing him special counsel resulting in a lack of mutual assent to the formation of an attorney-client relationship; and (d) a conflict of interest between Mr. Nace and the trustee, Mr. Trumble, existed that would prevent the formation of an attorney-client relationship.

Mr. Nace reminds us in his brief, "This Court knows that the existence of an attorney-client relationship is not determined by the rules of professional conduct." Instead, our common law governs the formation of the attorney-client relationship. *State ex rel. DeFrances v. Bedell,* 191 W. Va. 513, 517, 446 S.E.2d 906, 910 (1994). In *State ex rel. Bluestone Coal Corp. v. Mazzone,* 226 W. Va. 148, 159-60, 697 S.E.2d 740, 751-52 (2010), we discussed the attorney-client relationship:

> Whether an attorney-client relationship has been established is a matter of contract, and such contract may be evidenced either by written agreement or by implication. *See State ex rel. DeFrances v. Bedell,* 191 W.Va. 513, 517, 446 S.E.2d 906, 910 (1994) (per curiam) ("The relationship of attorney and client is a matter of contract, expressed or implied."). Where the attorney-client relationship has arisen by implication, we explicitly have "recognized that the attorney-client relationship can exist without an agreement for compensation[, and] an attorney-client relationship may be implied from the conduct

> of the parties." *Committee on Legal Ethics of the West Virginia State Bar v. Simmons,* 184 W. Va. 183, 186, 399 S.E.2d 894, 897 (1990) (per curiam) (citations omitted).

Furthermore, we have recognized that "[t]he determination of the existence of an attorney-client relationship depends on each case's specific facts and circumstances." *State ex rel DeFrances,* 191 W. Va. at 517, 446 S.E.2d at 910. Ultimately, we again look to the long-held precedent set forth in syl. pt. 1, *Keenan v. Scott,* 64 W. Va. 137, 61 S.E. 806 (1908):

> As soon as a client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.

Mr. Nace argues before this Court that he did not enter into an attorney-client relationship with Mr. Trumble. We disagree, finding the above quoted law dispositive.

Keenan requires two actions for the formation of an attorney-client relationship: (1) that the client express a desire to employ the attorney and (2) that there be a corresponding consent on the part of the attorney to act for him in a professional matter. The specific facts of this case, when applied to each of

these elements, illustrate the formation of the attorney-client relationship between Mr. Nace and Mr. Trumble.

Undoubtedly, Mr. Trumble expressed a desire to employ Mr. Nace. This was evident through the January 27, 2005, letter sent from Mr. Trumble's office to Mr. Nace. The letter, which was accompanied by an application to employ special counsel, a proposed order, and an affidavit, asked that Mr. Nace sign the affidavit if the documents met to his approval. The first element of *Keenan* is satisfied.

The second element of *Keenan* is also satisfied. By signing the affidavit and returning it to Mr. Trumble, Mr. Nace expressed a corresponding consent to act for Mr. Trumble in a professional manner. The affidavit Mr. Nace signed said, "I, Barry J. Nace, Esquire, declare: . . . That I am willing to accept employment by the Trustee on the basis set forth in the Application of Employ filed simultaneously herewith." Mr. Nace's willingness to accept employment was conditioned on entry of the corresponding order in the bankruptcy court. Because the order was entered, his willingness to accept employment was perfected, and he became Mr. Trumble's attorney as of the date of the entry of the order, March 4, 2009.[10]

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[10] This Court does not have jurisdiction to determine whether the order was valid; however, the validity of the order is irrelevant to whether an attorney-client relationship formed in this case. We do note, however, that if the order is ultimately

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Under the facts of this case, it is inconsequential to the formation of the attorney-client relationship whether Mr. Nace received notice that the order appointing him special counsel had been entered in the bankruptcy court; formation of the attorney-client relationship in this case was conditioned on entry of the order, not entry of the order *and* delivery of notice to Mr. Nace.[11]

We continue by recognizing that, as is evident from the facts of this case, any reasonable attorney, especially one with more than 40 years of experience, would have expected that an attorney-client relationship had formed. Mr. Trumble sent the January 27, 2005, special counsel employment letter to Mr. Burke and Mr. Nace. Both attorneys were specifically chosen to act as special counsel for Mr. Trumble because, through their involvement in Ms. Miller's case, they were uniquely situated to protect the interests of Mr. Trumble. This is a common practice. A reasonable attorney in Mr. Nace's position would have expected that upon returning the affidavit, Mr. Trumble would deliver the same to the bankruptcy court and an order would be entered appointing him special

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found to be invalid, while it will not nullify the attorney-client relationship, it may affect Mr. Nace's liability.

[11] Although Mr. Nace has vehemently denied having any knowledge of bankruptcy law prior to the commencement of this disciplinary proceeding, it is not clear from the record whether Mr. Nace knew, at the time he signed the affidavit, that he should receive notice of the entry of the order appointing him special counsel.

counsel. In fact, Mr. Nace admitted to expecting that exact scenario. The January 27, 2005, letter accompanying the affidavit stated that Mr. Trumble would "transmit the documentation to the Bankruptcy Court for approval," and Mr. Nace, as demonstrated by his own testimony during a deposition taken on May 24, 2011, knew that Mr. Trumble would be submitting the affidavit to the bankruptcy court upon receipt from Mr. Nace:

> Q. Mr. Trumble specifically told you upon return of the executed Affidavit he would be submitting the application to have you approved as special counsel, correct?
>
> A. [Mr. Nace] That's what he said he was going to do. And as I understand it, the court then had to do that, had to employ me. And I was never given any notice that I was employed by the court or by your client, that your client has admitted, which certainly sounds like a lot of negligence on his part to me.

In finding that an attorney-client relationship did exist between Mr. Nace and Mr. Trumble, we find no merit in the remainder of Mr. Nace's arguments involving this issue. Whether Mr. Trumble had the authority to assert control over Ms. Miller's interest in her case is irrelevant to the formation of an attorney-client relationship in this case for the reasons already stated. This issue goes to the liability of Mr. Trumble and Mr. Nace, and as such, it is outside of the jurisdiction of this Court. Mr. Nace's claim that a conflict

of interest exists between himself and Mr. Trumble would also not affect the formation of an attorney-client relationship. If a conflict does exist, it is Mr. Nace's responsibility to take the appropriate action to protect Mr. Trumble's interests.

B. Jurisdiction

In finding that Mr. Nace did form an attorney-client relationship with Mr. Trumble, we proceed to address Mr. Nace's second general argument challenging this Court's jurisdiction. Specifically, Mr. Nace alleges that his representation of Mr. Trumble is controlled by the order appointing Mr. Nace as special counsel in the bankruptcy court and that this Court lacks subject matter jurisdiction to determine whether Mr. Nace violated the duties and responsibilities described in the order. Additionally, Mr. Nace argues that Mr. Trumble exceeded his authority as bankruptcy trustee by filing an ethics complaint against Mr. Nace, and so the ethics complaint must be dismissed.

The Supreme Court of Appeals retains the ultimate authority to regulate and control the practice of law in West Virginia, and this authority is vested in the Court by the West Virginia Constitution. Syl. pt. 3, *Committee on Legal Ethics v. Karl,* 192 W. Va. 23, 449 S.E.2d 277 (1994) ("'In the exercise of their inherent power the courts may supervise, regulate and control the practice of law by duly authorized attorneys and prevent the unauthorized practice of

law by any person, agency or corporation.' Syl. pt. 10, *West Virginia State Bar v. Early,* 144 W.Va. 504, 109 S.E.2d 420 (1959)."); Syl. pt. 1, *State ex rel. Askin v. Dostert,* 170 W. Va. 562, 295 S.E.2d 271 (1982) ("The exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals."); Syl. pt. 7, in part, *W. Va. State Bar v. Earley,* 144 W. Va. 504, 109 S.E.2d 420 (1959) ("[T]he Legislature can not restrict or impair this power of the courts or permit or authorize laymen to engage in the practice of law."); *see also Chevy Chase Bank v. McCamant,* 204 W. Va. 295, 302, 512 S.E.2d 217, 224 (1998) ("[T]he [West Virginia Consumer Credit Protection Act] is not designed to regulate the practice of law. . . . This Court's exclusive authority to govern the practice of law is a constitutional mandate."); Syl. pt. 2, *Lawyer Disciplinary Bd. v. Kupec,* 202 W. Va. 556, 505 S.E.2d 619 (1998) ("The authority of the Supreme Court to regulate and control the practice of law in West Virginia, including the lawyer disciplinary process, is constitutional in origin. W.Va. Const. art. VIII, § 3."); *Lawyer Disciplinary Bd. v. Farber,* 200 W. Va. 185, 189, 488 S.E.2d 460, 464 (1997) ("[T]he [LDB] of the West Virginia State Bar, through its Disciplinary Counsel and Hearing Panel Subcommittee, is functioning . . . 'as an administrative arm of this Court.' *Lawyer Disciplinary Bd. v. Vieweg,* 194 W.Va. 554, 558, 461 S.E.2d 60, 64 (1995).").

Pursuant to the Court's authority over the practice of law in the state, the Court has promulgated

the Rules of Professional Conduct by which lawyers admitted to the West Virginia bar must abide. Violations of these rules are subject to review by the LDB, pursuant to the Rules of Lawyer Disciplinary Procedure, and subsequently, by this Court.

To the extent that Mr. Nace entered into an attorney-client relationship with Mr. Trumble, Mr. Nace practiced law in West Virginia. It is patently clear from our case law that the Court has the authority to supervise, regulate and control the practice of law in this state, and so the Court has subject matter jurisdiction over Mr. Nace's practice of law in West Virginia. Contrary to Mr. Nace's suggestion, the Court is not divested of jurisdiction merely because the order appointing him as special counsel was entered in the bankruptcy court. The disciplinary proceeding before this Court is not contingent upon the construction of the order appointing him special counsel; instead, it depends only on whether an attorney-client relationship formed, which did occur. The duties and responsibilities the LDB asserts Mr. Nace owed to Mr. Trumble and violated are those dictated by the Rules of Professional Conduct, not those required by the order.[12]

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[12] Because we do not have the subject matter jurisdiction to do so, this Court does not make any determination as to whether Mr. Nace has violated any duties or responsibilities owed to Mr. Trumble under the order entered in bankruptcy court. Our findings in this opinion are limited only to those duties owed pursuant to Mr. Nace's practice of law in West Virginia.

As an attorney in West Virginia, Mr. Trumble had an affirmative duty to inform the ODC of his belief that Mr. Nace had committed violations of the Rules of Professional Conduct. Rule 8.3(a) states, "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." The duty to report is independent of Mr. Trumble's position as trustee; the duty arises from his membership in the West Virginia bar. Therefore, we conclude that this disciplinary proceeding is properly before this Court.

C. Sanctions

The HPS found by clear and convincing evidence that Mr. Nace had violated Rules 1.1, 1.3, 1.4(a) and 1.4(b), 1.15(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct. For these violations, the HPS recommended sanctions including the suspension of Mr. Nace's license to practice law for 120 days. When reviewing the sanctions imposed by the HPS, this Court considers a number of factors. We have held,

> Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: "In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme

> Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors."

Syl. pt. 4, *Office of Lawyer Disciplinary Counsel v. Jordan,* 204 W. Va. 495, 513 S.E.2d 722 (1998). Moreover,

> [i]n deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Syl. pt. 3, *Committee on Legal Ethics of the West Virginia State Bar v. Walker,* 178 W. Va. 150, 358 S.E.2d 234 (1987). The undisputed facts in this case support the HPS's findings that Mr. Nace violated the Rules of Professional Conduct.

Rule 1.1, entitled "Competence", states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably

necessary for the representation." Rule 1.3, entitled "Diligence", states, "A lawyer shall act with reasonable diligence and promptness in representing a client." Mr. Nace ardently denies having any knowledge of bankruptcy law prior to signing the affidavit, and he insists that his ignorance as to bankruptcy law persisted until the commencement of this disciplinary proceeding against him. He negligently failed to acquire the legal knowledge and skill to adequately represent Mr. Trumble during the course of his representation of Mr. Trumble, even after Mr. Burke withdrew from representation of Ms. Miller. This behavior also indicates a lack of diligence on Mr. Nace's part to acquire the skills needed to adequately represent his client. Therefore, Mr. Nace violated Rules 1.1 and Rule 1.3.

The undisputed facts indicate that Mr. Nace also did not adequately communicate with Mr. Trumble. Mr. Nace did not make any attempts to communicate with Mr. Trumble between early 2005 when he signed and returned the affidavit and October 2008 when he responded to Mr. Trumble's request for communication in October of 2008. Events pertinent to Mr. Nace's representation of Mr. Trumble of which Mr. Trumble should have been apprised occurred during this time frame. Rule 1.4, "Communication", states, "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions

regarding the representation." Mr. Nace violated Rules 1.4(a) and 1.4(b) by failing to keep Mr. Trumble reasonably informed about the status of Ms. Miller's case so that Mr. Trumble could make informed decisions regarding the representation.

Mr. Nace also violated Rule 1.15(b). This rule required that Mr. Nace, upon receiving the relevant funds in Ms. Miller's case in which Mr. Trumble had an interest, notify Mr. Trumble. The rule, entitled "Safekeeping Property", states, in part, "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." As stated above, after returning the affidavit to Mr. Trumble, Mr. Nace's next communication with Mr. Trumble was more than a year and a half after the final jury verdict was entered in Ms. Miller's case and more than six months after Mr. Nace distributed the funds from Ms. Miller's case. Moreover, Mr. Nace's renewed communication with Mr. Trumble commenced only after Mr. Trumble contacted Mr. Nace.

We agree with the LDB that Mr. Nace violated Rule 8.4(c). This subsection under the rule titled "Misconduct" states that "[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The record reflects that Mr. Nace was dishonest with Mr. Trumble regarding the proceeds of the partial settlement. Mr. Trumble, in his November 14, 2008, letter, requested settlement documents. Mr. Nace's response letter stated more than once that there was

no settlement. We will not parse semantics; a partial settlement is a settlement, and Mr. Nace was knowingly untruthful about the settlement with Mr. Trumble. This is a violation of Rule 8.4(c), which states that it is professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Finally, we find that Mr. Nace violated Rule 8.4(d), which declares that it is professional misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice." Mr. Nace received a subpoena duces tecum requesting his complete client file relating to his representation of Mr. Trumble. In his October 12, 2011, affidavit, Mr. Nace asserted that he never had a Trumble file. It is not clear why Mr. Nace did not advise the LDB of this fact at the time he received the subpoena, at the April 7, 2010, hearing, or at the October 10, 2011, hearing. This behavior alone does not indicate a nefarious intent. However, Mr. Nace did provide select documents from his Miller file, which shows that he knew the relevant documents – the documents the LDB were seeking – were actually those in his Miller file. Furthermore, he made no indication when submitting those documents at the April 7, 2010, hearing that the documents were not from his Trumble file. We note also that the September 26, 2008, letter from Mr. Nace to Ms. Miller, which appears to contradict Mr. Nace's sworn statements concerning his knowledge of the bankruptcy proceedings, was not included in the documents Mr. Nace provided to the LDB – it was

only discovered after an examination of Mr. Burke's files. Finally, we are cognizant that Mr. Nace represented to the LDB for over 24 months that he did not receive from Mr. Trumble a copy of the application to employ special counsel and the proposed order, yet a review of his Miller files by his current counsel prior to the October 10, 2010, hearing revealed these documents. Based on these facts, this Court can reach no other conclusion than that Mr. Nace intentionally obfuscated the investigation of the LDB in violation of Rule 8.4(d).

The harm caused by Mr. Nace's conduct is substantial. Initially, we recognize that attorneys who engage in professional misconduct, particularly conduct that is deceitful, damage the public's confidence in the bar and the legal profession. The harm to Mr. Trumble's interests, while not completely definite at present, is also potentially great.[13] In deciding the appropriate sanction in this case, we are mindful that the sanction must be designed to adequately restore public confidence in the bar.

The Court considers mitigating factors in lawyer disciplinary cases. "Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Syl. pt. 2, *Lawyer Disciplinary*

[13] The bankruptcy court is the proper body to determine what portion of Ms. Miller's malpractice award Mr. Trumble should have received from Mr. Nace.

Bd. v. Scott, 213 W. Va. 209, 579 S.E.2d 550 (2003). We have further explained that

> [m]itigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

Id. at syl. pt. 3. There are mitigating factors present in this case that weigh in favor of Mr. Nace. He has no history of ethics violations in West Virginia or the other jurisdictions in which he has been admitted to practice in his practice spanning more than 40 years. Additionally, the Court recognizes that he is esteemed among his peers.

The Court must also consider aggravating factors. "Aggravating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify an increase in the degree of discipline to be imposed." *Id.* at syl. pt. 4. Of the aggravating factors

in this case, most notable is Mr. Nace's refusal to accept any hint of responsibility for the harm caused by his failure to properly represent Mr. Trumble, for his dishonest conduct, or for obscuring a full investigation by the LDB. Instead, Mr. Nace has repeatedly shifted responsibility onto others. In his brief to this Court, Mr. Nace writes extensively on Mr. Trumble's duties as trustee and how Mr. Trumble did not fulfill his responsibilities as trustee. While this Court is not in any position to evaluate Mr. Trumble's responsibilities as trustee – the matter is not properly before this Court[14] – there is ample evidence that Mr. Nace, as Mr. Trumble's attorney, had his own set of duties and responsibilities that he failed to perform. Mr. Trumble is Mr. Nace's client, not the other way around.

When Mr. Nace was questioned by the HPS as to why the September 26, 2006, letter he sent to Ms. Miller was not included in the documents he

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[14] In his brief, Mr. Nace asserts,

> HPS' statement that it "makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter" reveals its refusal to objectively evaluate and consider Nace's legitimate, credible factual and legal defense in this most important matter. . . . Such action by the HPS is arbitrary and violates Nace's constitutional due process rights in providing a factual and legal defense to the charges and arguing same in mitigation.

Mr. Trumble's misconduct, in the context of this proceeding, was not within the purview of the HPS. The HPS did not violate Mr. Nace's due process rights in failing to examine Mr. Trumble's actions.

submitted to the LDB, he again shifted blame, this time to the LDB. In his October 12, 2011, affidavit, Mr. Nace said, "Indeed, the questions by the [LDB] and the subpoena requests, in retrospect, were clearly inartful. That, however, is not my fault." As we discussed above, it is apparent to us that Mr. Nace was aware of the documents the LDB desired – documents related to Ms. Miller's bankruptcy and Mr. Nace's representation of Mr. Trumble – but he deliberately avoided producing them.

The aggravating factors far outweigh the mitigating factors in this case. It is the finding of this Court that the sanctions recommended by the HPS are adequate to punish Mr. Nace, to serve as a deterrent to other members of the bar, and to restore public confidence in the ethical standards of the legal profession.

IV.

CONCLUSION

For the foregoing reasons, the Court adopts the recommendations presented by the HPS in its March 21, 2012, report, imposing the following discipline upon Mr. Nace: that he be suspended from the practice of law for 120 days without any requirement for reinstatement; that he provide community service through pro bono work for a total of 50 hours; that he satisfy any obligations imposed on him in the final disposition of the pending adversary proceeding in the United States Bankruptcy Court for the Northern

District of West Virginia filed by the bankruptcy trustee, Mr. Trumble; and that he be ordered to pay the costs of the proceedings before the HPS pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Recommendations Adopted.

BEFORE THE SUPREME COURT OF APPEALS OF STATE OF WEST VIRGINIA

In re: BARRY J. NACE,	Bar No.: 7373
a member of The West	I.D. No.:11-0812
Virginia State Bar	Supreme Court No. 09-05-353

Report of the Hearing Panel Subcommittee

I. Relevant Procedural History

Formal charges were filed against Respondent, Barry J. Nace, with the clerk of the Supreme Court of Appeals on or about May 17, 2011 and served upon Respondent via certified mail by the clerk on May 23, 2011. Disciplinary Counsel filed her mandatory discovery on or about June 9, 2011. Respondent filed his Answer to Statement of Charges on or about July 13, 2011. Respondent provided his mandatory discovery on or about September 28, 2011.

Thereafter, this matter proceeded to hearing in Martinsburg, West Virginia, on October 10, 2011. The Hearing Panel Subcommittee was comprised of Debra A. Kilgore, Esquire, Chairperson, Sean D. Francisco, Esquire, and Ms. Cynthia L. Pyles, layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel (ODC). J. Michael Benninger appeared on behalf of Respondent, who also appeared. At the commencement of the hearing, the Hearing Panel Subcommittee denied Respondent's Motion to Dismiss and granted a motion for Respondent Nace's case to be heard simultaneously with the companion proceeding

against D. Michael Burke, Esquire. The Hearing Panel Subcommittee heard testimony from Robert W. Trumble, J. Michael Burke and Respondent. In addition, ODC Exhibits 1-19 and Respondent's Exhibits 1A-7A and 1-45 were admitted into evidence.

II. FINDINGS OF FACT

1. Respondent, Barry J. Nace, is a lawyer practicing in Washington, D.C. Respondent is licensed to practice in West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on March 19, 1997. He has been practicing law since 1970 and is admitted in Pennsylvania (now inactive by choice) Maryland, and Washington, D.C. (TR, Nace pp. 268, 314-316.)

2. On February 5, 2004, Barbara Ann Miller entered into a Contract of Employment and Authority to Represent with Attorney D. Michael Burke regarding her medical malpractice case involving her deceased husband. The agreement stated forty percent (40%) of the proceeds would be paid to the firm for the representation. (ODC Exhibit #1, p. 25.)

3. On September 27, 2004, Barbara Ann Miller filed a Chapter 7 Voluntary Petition in the U.S. Bankruptcy Court in the Northern District of West Virginia, Bankruptcy Petition #: 3:04-bk-03365 in

Martinsburg, West Virginia. (ODC Exhibit #19, pp. 341-342.)

4. On September 27, 2004, Robert W. Trumble was appointed as Interim Trustee. (ODC Exhibit #18, p. 312.)

5. On December 21, 2004, an Order discharging Ms. Miller was entered. (*Id.*)

6. On January 12, 2005, Mr. Trumble filed a Trustee's Notice of Assets & Request for Notice to Creditors with Requests to Issue Claims. (*Id.*)

7. On January 13, 2005, Mr. Trumble filed the Notice to Creditors to File Claims. (*Id.*)

8. On January 11, 2005, Robert Trumble, the bankruptcy Trustee, sent a letter to Michael Burke advising he had been appointed Trustee to handle the bankruptcy estate of Barbara Miller and she had testified at the Meeting of the Debtor that Mr. Burke was handling a medical malpractice claim on her behalf. Mr. Trumble asked for a valuation of the case. (ODC Exhibit #1 p. 9.)

9. On January 25, 2005, Mr. Burke sent a letter to Mr. Trumble stating "[t]he potential claim of Barbara Miller is being reviewed by Barry J. Nace, my co-counsel . . . " and that any evaluation could not be done until a medical review was completed. Respondent also appears as "of counsel" on Mr. Burke's firm letterhead. (ODC Exhibit #1, p. 11.)

10. Although Respondent appears as "of counsel" on Mr. Burke's law firm's letterhead, he is a member of a separate law firm, Paulson and Nace, located in Washington, D.C.

11. On January 27, 2005, Mr. Trumble sent Mr. Burke and Respondent separate correspondence with a copy of the Trustee's Application to Employ Special Counsel, a proposed Order Authorizing Trustee to Employ Special Counsel and an Affidavit for them to sign regarding their appointment as special counsel. The January 27, 2005 letter also requested Respondent to review the enclosed documents and if they meet with his approval, to sign the Affidavit. Mr. Trumble further advised that upon receipt of the signed Affidavit, he would transmit "the documentation to the Bankruptcy Court for approval." (ODC Exhibit #1 pp.12-18.)

12. On February 1, 2005, Mr. Burke signed the Affidavit where he stated he is "willing to accept employment by the Trustee on the basis set forth in the Application to Employ." (ODC Exhibit #1 p. 24.)

13. On February 24, 2005, Respondent also signed the Affidavit where he stated he is "willing to accept employment by the Trustee on the basis set forth in the Application to Employ." The Affidavit also states: "I am experienced in rendering legal services of the same nature for which I am being employed on behalf of the Bankruptcy Estate." (ODC Exhibit #1 p.23.)

14. Respondent forwarded the signed Affidavit to Mr. Trumble by letter dated February 24, 2005 and noted his new office address as of March 5, 2005. (ODC Exhibit #1, p. 20.)

15. On March 3, 2005, Mr. Trumble filed with the bankruptcy court the Trustee's Application to Employ Special Counsel. Within that application, Mr. Trumble stated he found "it necessary and in the best interest of this estate to employ D. Michael Burke, and [Respondent], as Trustee's legal counsel to pursue the Debtor's personal injury claim as a result of a vehicular accident, under a contingency fee arrangement."[1] (ODC Exhibit #1, pp. 21-22.)

16. On March 4, 2005, the Order Authorizing Trustee to Employ Special Counsel was entered by the bankruptcy court and served by the court on all parties, including Respondent. (ODC Exhibit #1, p. 26; TR, Trumble p. 22; Nace Exhibit #41.)

17. Respondent claims he never received a copy of the entered March 4, 2005 Order. However, there was no return to the court indicating Respondent was not served with the Order. (TR, Trumble p. 96; Nace pp. 302-304.)

18. Mr. Trumble testified the signing of the Affidavit is the attorney's agreement to act as special

[1] The reference to the Miller claim as a personal injury resulting from a vehicular accident, rather than a medical malpractice claim, was a clerical error. (TR, Trumble pp 16-17, 64.)

counsel in the bankruptcy case; and that when Respondent signed the Affidavit he believed "we had an agreement for representation." (TR, Trumble pp. 17-18, and 72.)

19. Mr. Burke understood when he signed the Affidavit that at that point he had been retained by the Trustee as special counsel regardless of whether he received an Order from the Court authorizing his employment. (TR, Burke, pp. 262-263.)

20. Mr. Trumble then communicated with Mr. Burke and relied on Mr. Burke to communicate with Respondent since he understood they were acting as co-counsel in the Miller case. (TR, Trumble pp. 78-79.)

21. Respondent states he signed the Affidavit because Mr. Burke asked him; that the fact Ms. Miller filed for bankruptcy "meant nothing to me;" that he was not "familiar at all" with bankruptcy law; and that once he signed the Affidavit "it was out of [my] mind." (TR, Nace pp. 272-273, 275-277, and 302.)

22. Respondent's position is the Affidavit he signed was not his agreement to be employed, just an expression of his "willingness" to be employed (TR, Nace p. 340), and that he was not employed until the Court entered an Order *and* he received it. (TR, Nace pp. 303-304.)

23. On May 18, 2005, Mr. Trumble sent a letter to Mr. Burke about "the status of the Debtor(s)

medical malpractice claim which is an asset of [the] Bankruptcy Estate." (ODC Exhibit #1, p. 27.)

24. By letter dated May 24, 2005, Mr. Burke replied to Mr. Trumble explaining that his "co-counsel" had notified the potential defendants that "our expert has determined [they] were at fault . . . ," and Respondent and co-counsel were waiting for a response from the defendants. Mr. Burke further stated the case "can be expected to take several years to complete." (ODC Exhibit #1, p. 28.)

25. Mr. Burke instructed his secretary to mail a copy of Mr. Trumble's May 18, 2005 letter to Respondent. Mr. Burke's secretary noted on the letter it had been mailed to Respondent's office May 23, 2005. (TR, Burke pp. 199-200; ODC Exhibit – Burke, #3 p. 69.)

26. Respondent says he never received this letter. (TR, Nace pp. 280-281.)

27. Mr. Burke testified the May 23, 2005 mailing to Respondent was not returned to his office. (TR, Burke pp. 200-201.)

28. On June 17, 2005, a complaint of medical malpractice was filed in the Circuit Court of Berkeley County by Respondent and Mr. Burke on behalf of Ms. Miller as plaintiff against Defendants Jesse B. Jalazo, M.D., Martinsburg Internal Medicine Associates, Inc., James M. Carriers, M.D., Timothy K. Bowers, M.D., Old Mill Internists, Ltd., and City Hospital, Inc. Mr. Burke's signature is signed by

Lawrence Schultz, Esquire, who noted his name and his Bar Number, 4293. (ODC Exhibit #16, pp. 421-427.)

29. On July 8, 2005, Respondent filed an Amended Complaint with only his name on the complaint. (ODC Exhibit #16, pp. 428-434.)

30. On July 25, 2005, D. Michael Burke withdrew as Ms. Miller's attorney due to a personal conflict of interest but informed Ms. Miller that Respondent would continue as her counsel. (ODC Exhibit-Burke #9, p. 185.) No written withdrawal notice or motion to withdraw was submitted to the bankruptcy court or bankruptcy Trustee.

31. In September of 2006, a partial settlement with Defendant City Hospital, Inc. was reached in Ms. Miller's medical malpractice claim for Seventy-Five Thousand Dollars ($75,000.00). (ODC Exhibit #10, pp. 243-255.)

32. On September 27, 2006, Ms. Miller signed a Statement of Account Paul Miller regarding the Seventy-Five Thousand Dollars ($75,000.00) Gross Settlement. Ms. Miller received Ten Thousand One Hundred Twenty-Six and 16/100 ($10,126.16). The balance of the money was applied to attorney fees and expenses. (ODC Exhibit #10, p. 251.)

33. Respondent wrote to Ms. Miller by letter dated September 26, 2006 outlining the partial settlement and enclosing a Release and other documents for Ms. Miller to sign. Respondent instructed Ms.

Miller to contact Mr. Burke's secretary to have her signature notarized. Respondent also stated: "presumably you have a bankruptcy attorney and if so that person should call me so I know whether or not a check can be written to you." (ODC Exhibit – Burke #9, p. 296.)

34. Respondent does not remember following up with Ms. Miller or her bankruptcy attorney about the status of the bankruptcy case in September of 2006. (TR, Nace pp. 348-349.)

35. Respondent admits the Affidavit he signed agreeing to be employed by the Trustee was in his file at that time. (TR, Nace p. 349.)

36. In Respondent's initial response to the ethics complaint made in this proceeding, he states that at the time he disbursed the $75,000.00 partial settlement, "[h]ad I been aware then or at any time that she was in bankruptcy proceedings, I would have done whatever I was Ordered to do by the Court." (ODC Exhibit #3, p. 58, paragraph 43.)

37. Respondent did not seek permission from the bankruptcy Trustee to partially settle the case nor distribute the proceeds. (TR, Nace p. 285.)

38. On or about October 30, 2006, Ms. Miller's case proceeded to jury trial against the remaining defendants. (ODC Exhibit #16, pp. 446-453.)

39. On November 9, 2006, the jury returned a verdict against Defendant Dr. Jesse B. Jalazo for a total of Five Hundred Thousand Dollars ($500,000.00). Ms.

Miller recovered no judgment from Defendants James Carrier, M.D., and Timothy Bowers, M.D. (*Id.*)

40. Judgment was entered upon the jury verdict January 4, 2007, awarding Plaintiff $425,000.00, thereby reducing the $500,000.00 award by the settlement of $75,000.00. (*Id.*)

41. On July 27, 2007, Mr. Trumble sent a letter to Mr. Burke again asking about "the status of the Debtor(s) medical malpractice claim which is an asset of [the] Bankruptcy Estate."

42. On July 27, 2007, Defendant Dr. Jesse B. Jalazo filed an appeal of the judgment. (ODC Exhibit #16, pp. 454-496.)

43. On August 8, 2007, Mr. Burke faxed and mailed a copy of Mr. Trumble's July 27, 2007 letter to Gabriel Assad, an associate in Respondent's office. A "Fax Cover Memorandum" from Mr. Burke's office shows it was delivered to "Gabriel", from "Lacy," on August 8, 2007. Lacy Godby is Mr. Burke's secretary. Handwriting also states: "per Gabe send to him he will handle 8/8/07." (TR, Burke p. 204, 247; ODC Exhibit Burke #9, pp. 294-295.)

44. Respondent says he did not receive this letter. (TR, Nace p. 292.)

45. On February 12, 2008, the Supreme Court of Appeals for West Virginia refused the petition for appeal. (ODC Exhibit #16, p. 497.)

46. On February 28, 2008, Ms. Miller signed a Statement of Account Paul Miller wherein the net proceeds to the client was to be Two Hundred Twenty Thousand Four Hundred sixty-Seven and 45/100 Dollars ($220,467.45). (ODC Exhibit #10, p. 268.)

47. On March 5, 2008, Respondent sent a letter to Ms. Miller which included a check for her share of the verdict. Respondent paid the costs and fees and the balance went to Ms. Miller. Respondent sent Ms. Miller a check for Two Hundred Twenty Thousand Four Hundred Sixty-Seven Dollars and Forty-Five Cents ($220,467.45). (ODC Exhibit #10, pp. 268-273.)

48. Respondent and Mr. Burke had previously stated that a small referral fee was paid to Mr. Burke, but at the October 10, 2011 hearing both Respondent and Mr. Burke testified there was no such payment. (TR, Burke p. 211; Nace pp. 301-302.)

49. On October 10, 2008, Mr. Trumble sent a letter to Mr. Burke and Respondent noting that both individuals were employed as special counsel to him. Mr. Trumble indicated that he discovered the medical malpractice case "was resolved and that all of the proceeds were turned over to the Debtor, Barbara Miller." Mr. Trumble stated that he "was not contacted by either [individual] to obtain [his] authority as to the settlement of [the] matter, nor did [Mr. Trumble] receive any documentation relating to the settlement, or any of the settlement proceeds." Mr. Trumble requested copies of all documents regarding the settlement and indicated that any amount of the

settlement proceeds that exceeded what Ms. Miller was allowed would force him to seek recovery of the estate's portion of the settlement proceeds. The letter was sent to Respondent at Paulson & Nace, 1814 North Street, NW, Washington, D.C., 20036. (ODC Exhibit #1, pp. 30-31.)

50. On November 14, 2008, Mr. Trumble sent a second request to Respondent and Mr. Burke for settlement documents referred to in his October 10, 2008 letter. The letter was sent to Respondent at Paulson & Nace, 1615 New Hampshire Avenue, NW, Washington, D.C., 20009-2520. The first letter to Respondent was sent to the wrong address. (ODC Exhibit #1, p., 32; TR, Trumble p. 31.)

51. On December 1, 2008, Respondent sent a letter to Mr. Trumble advising Mr. Tumble that he did not receive the October 10, 2008 letter due to the wrong address. Respondent said he had been contacted several months ago by someone regarding the status of the case and Respondent further stated he informed the person "that there was not any settlement and that the case was tried to jury verdict and then went on appeal and reported by the Court of Appeals when they declined to accept the defendants' petition." In addition, Respondent said: "I am not sure why you would expect us to contact you to obtain authority as to a settlement since there was no settlement." (ODC Exhibit #1, p. 34.)

52. Respondent further stated in his December 1, 2008 letter that he would attempt to collect the

documentation requested by Mr. Trumble and he asked to be advised about the "Debtor's allowable exemption." (*Id.*)

53. On January 5, 2009, Mr. Trumble sent a letter to Respondent stating that Respondent was hired to represent the Trustee's interest in the medical malpractice action regardless of the case being settled, tried before a jury or resolved on appeal. Mr. Trumble stated "as the Trustee of the Bankruptcy Estate and your client, I should have been informed of the ultimate disposition of this matter and I should have received the proceeds from the recovery on the judgment which you obtained." Mr. Trumble further stated the allowable exemption for Ms. Miller was Twenty-Five Thousand Seven Hundred and Sixty-Eight Dollars ($25,768.00) and after Respondent took his fees and expenses, the rest of the proceeds recovered in the matter should have been turned over to Mr. Trumble as Trustee. Thereafter he would provide Ms. Miller with her allowable exemption and distribute the rest to creditors in the bankruptcy estate. Mr. Trumble informed Respondent that he violated his duty to Mr. Trumble as a client and asked that Respondent put his malpractice carrier on notice. (ODC Exhibit #1, pp. 36-37.)

54. By letter dated February 4, 2009, Respondent responded to Mr. Trumble stating he had not heard anything from Mr. Trumble since signing the Affidavit in February of 2005 and he had never received the Trustee's Application to Employ Special Counsel. Respondent pointed out that the Application

referred to a personal injury claim as a result of a "vehicular accident," and he did not represent Ms. Miller or her deceased husband's estate in a vehicular accident case. Respondent also said he never received a copy of the Order Authorizing Trustee to Employ Special Counsel until he received Mr. Tumble's January 5, 2009 letter. Finally, Respondent stated he had no notice from Mr. Trumble or the court that the Order had been entered appointing Respondent as special counsel. (ODC Exhibit #1, pp. 48-50.)

55. On July 13, 2009, Mr. Trumble filed an ethics complaint against Respondent because of Respondent's distribution of the proceeds from the medical malpractice case without regard to the bankruptcy estate. (ODC Exhibit #1, pp. 1-3.).

56. On August 25, 2009, Respondent filed his response to the complaint. Within his response, Respondent admitted signing the Affidavit but denied ever seeing a copy of the Trustee's Application or Order employing him as special counsel. (ODC Exhibit #4, pp. 53-59.)

57. On October 5, 2010, Mr. Trumble filed a Trustee's Complaint for Breach of Contract and Legal Negligence in the U.S. Bankruptcy Court for the Northern District of West Virginia, Case Number 04-03365 against Respondent and Mr. Burke based upon their failure to turn over proceeds from the medical malpractice case to the Trustee. (ODC Exhibit #17, pp. 280-283.)

III. CONCLUSIONS OF LAW

Respondent contends no attorney-client relationship existed between him and the bankruptcy Trustee, Robert Trumble. An attorney client relationship exists:

> As soon as the client has expressed a desire to employ an attorney, and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.

State of West Virginia ex rel. DeFrances v. Bedell, 446 SE 2nd 906, Sylb. Pt. 3 (W. Va.1994), *quoting,* Sylb. Pt. 1 *Keenan v. Scott,* 61 SE 806 (W. Va. 1908). An attorney – client relationship can exist without an agreement for compensation, and it can be implied from the conduct of the parties. *Bedell, supra* at 910.

Mr. Trumble, by letter of January 27, 2005, sent Respondent the Trustee Application to Employ Special Counsel, a proposed Order, and an Affidavit for Respondent to sign. Mr. Trumble requested Respondent to review the documents and if they met with his approval to sign the Affidavit and return it. The Application provides the Trustee is making "application to this Court to employ D. Michael Burke . . . and Barry J. Nace, Esq. of the law firm of Paulson & Nace. . . ." Mr. Nace signed the Affidavit and returned

it to Mr. Trumble. In the Affidavit, Respondent declares in part as follows:

> 2. That I am experienced in rendering legal services of the same nature *for which I am being employed* on behalf of the Bankruptcy Estate.
>
> 3. That *I am willing to accept employment* by the Trustee on the basis set forth in the Application to Employ filed simultaneously herewith.

(Emphasis added.)

The Hearing Panel Subcommittee finds Mr. Trumble's letter of January 27, 2005 with the enclosed documents was an expression to employ Respondent as special counsel and Respondent's signing of the Affidavit and return of it to Mr. Trumble was his consent to be employed.

Respondent argues when he signed the Affidavit he did not *agree* to be employed, but only expressed a *willingness* to be employed. This argument fails for several reasons. First, this argument omits the balance of paragraph 3 of the Affidavit quoted above. Plainly, Respondent stated in the Affidavit not just that he was willing to be employed, but he was willing to be employed on the basis of the Application to Employ Special Counsel. The Application sets out the reasons the Trustee desires to employ special counsel and the qualifications of Respondent and Mr. Burke. So, when Respondent states in the Affidavit he is willing to accept employment on the basis set forth in

the Application, he is simply accepting the reasons and his qualifications for appointment as special counsel, Second, there is no distinction between a *willingness* to be employed and an *agreement* to be employed. Both words connote an acceptance. Third, the Affidavit as a whole, especially when read together with the Application, expresses a consent to be employed as special counsel.

Respondent further argues he was not employed until the bankruptcy court entered the Order approving his appointment. The Order, however, was entered by the court and served upon Respondent. Although Respondent now claims he never received the entered Order, this mailing was not returned to the court. Nevertheless, Respondent made no effort to follow up on the entry of the Order if he felt he was not employed until it was "perfected" by entry by the court, which is doubtful since Respondent testified he knew nothing about bankruptcy law and "doubted" he even knew an Order needed to be entered to establish his employment as special counsel. (TR, Nace pp. 277-278.) At any rate, since Respondent had consented to be employed as special counsel by signing the Affidavit and returning it to Mr. Trumble, he had an obligation to follow up on the entry of the Order if he considered that necessary to his employment.

Rule 3.7 of the Rules of Lawyer Disciplinary Procedure provides, "in order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proved by clear and convincing evidence."

Respondent has been charged with violating Rules 1.1, 1.3, 1.4(a), 1.4(b), 1.15(b), 8.4(c) and 8.4(d) which provide as follows:

Rule 1.1 Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.15 Safekeeping property.

(b) [A] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. . . .

Rule 8.4 Misconduct.

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

As discussed below, the evidence is clear and convincing that Respondent violated Rules 1.1, 1.3, 1.4(a), 1.4(b), 1.15(b), 8.4(c), and 8.4(d).

Respondent was also charged with violating Rule 1.5(a) providing for the reasonableness of lawyer's fees. There is no clear and convincing evidence to support any violation of this Rule. Accordingly, this charge should be dismissed.

IV. DISCUSSION

Respondent testified he knew nothing about bankruptcy law, yet he signed the Affidavit accepting employment as special counsel for the bankruptcy Trustee. There is no evidence he made any attempt to learn about bankruptcy law or his duties and obligations as special counsel to the Trustee. In fact, as Respondent stated, once he signed the Affidavit, the bankruptcy matter was "out of my mind." (TR, Nace p. 302.) Clearly, Respondent did not have and made no effort to acquire the legal knowledge, skill, thoroughness and preparation reasonably necessary to represent the bankruptcy Trustee. Thus, Respondent

violated Rule 1.1 of the Rules of Professional Conduct.

Respondent's failure to acquire the minimum knowledge to represent the bankruptcy Trustee, as well as his failure to obtain the Trustee's approval prior to partially settling the Miller case; his failure to obtain the Trustee's approval to distribute the partial settlement funds of $75,000.00; and his failure to obtain the Trustee's approval prior to the distribution of the jury award and judgment in the amount of $425,000.00,[2] amounts to a failure to act reasonably diligent in his representation of the Trustee and to keep the Trustee reasonably informed, thereby violating Rules 1.3, 1.4(a), and 1.4(b).

Also, because Respondent did not notify the bankruptcy Trustee of the $75,000.00 settlement and the jury verdict before distributing the monies, he violated Rule 1.15(b) requiring an attorney to promptly deliver funds or property to which the client is entitled to receive.

Rule 8.4(a) provides it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. When the bankruptcy Trustee wrote to Respondent on November 14, 2008 inquiring about the status of the Miller case, Respondent, by letter of December 1, 2008, told

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[2] The total proceeds distributed, with interest, was $480,541.88 (ODC Exhibit #10 p. 268.)

Mr. Trumble there had been no settlement and, therefore, no reason to obtain the Trustee's authority to settle. (ODC Exhibit #1, p. 34.) In fact, there had been a partial settlement of the Miller case for $75,000.00 in September 2006 and the representation to the Trustee was plainly false and misleading, thereby amounting to a violation of Rule 8.4(a).

Finally, Respondent's conduct resulted in the bankruptcy Trustee not receiving the proceeds from the Miller case to distribute to creditors, among others, as part of the bankruptcy case. This conduct was prejudicial to the administration of justice in violation of Rule 8.4(d).

V. Recommended Sanctions

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. *Lawyer Disciplinary Board v. Taylor,* 451 S.E. 2d 440 (W.Va. 1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury

caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, *Office of Disciplinary Counsel v. Jordan,* 513, S.E. 2d 722 (W.Va. 1998).

A. Respondent violated duties owed to his clients, to the public, to the legal system and to the legal profession.

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of the court, and as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state. Furthermore, a lawyer's duties also include maintaining the integrity of the profession. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his client, the public, the legal system, and the legal profession.

Essentially, in this case, Respondent and Mr. Burke jointly undertook to represent Ms. Miller and determine the viability of her medical malpractice claim. Mr. Burke represented to the Trustee that he and Respondent were co-counsel, and Respondent is listed as "of counsel" on Mr. Burke's office letterhead. Therefore, the Trustee reasonably relied upon Mr. Burke to communicate with Respondent. On January 25, 2005, the Trustee sent separate correspondence to

Respondent and Mr. Burke enclosing an Application to Employ Special Counsel, a proposed Order Authorizing Appointment as Special Counsel, and an Affidavit. Each signed the Affidavit consenting to be employed as special counsel to the Trustee.

Respondent signed the Affidavit, apparently relying on Mr. Burke for his knowledge of the duties and obligations of special counsel since Respondent admits he signed the Affidavit even though he had no knowledge of bankruptcy law. Further, Respondent says he signed the Affidavit because Mr. Burke requested him to do so. Thereafter, by his own admission, he gave the matter no more thought.

Nevertheless, even though Respondent gave his employment as special counsel no more thought, he is still charged with knowledge of that responsibility. He is also charged with knowledge of the entire contents of his client's files, which included, at the very least, his signed Affidavit to be employed as special counsel. When Mr. Burke later withdrew from representing Ms. Miller, Respondent assumed sole responsibility for representing not only Ms. Miller but the bankruptcy Trustee. Significantly, Mr. Burke withdrew on July 25,2005, just five months after Respondent signed the Affidavit on February 24, 2005. If Respondent had been relying on Mr. Burke to advise him of his responsibilities as special counsel, when Mr. Burke withdrew, a reasonably competent and diligent attorney would have at that time taken notice of the Affidavit and made some effort to determine his duties and responsibilities.

Respondent continued to work on the Miller case and obtained a settlement of $75,000.00 in September 2006 from one of the defendants. Respondent did not inform the Trustee nor obtain his authority to settle. Respondent's defense is that he had nothing in his file at that time about the bankruptcy. As Respondent testified, "[t]here wasn't anything in [our] file that was saying anything about bankruptcy. (TR, Nace, p. 285.) In this regard, Respondent initially maintained in his sworn statement to ODC that he did not receive copies of the Application to Employ Special Counsel and the proposed Order to Employ Special Counsel referenced in the Trustee's January 25, 2005 letter. (ODC Exhibit #9 p. 124.) Further, in Respondent's response to the initial complaint in this matter, Respondent stated that "Ms. Miller never mentioned anything about a bankruptcy to me, nor had her bankruptcy attorney, Mr. O'Brien, ever contacted me. Had I been aware then or at any time that she was in bankruptcy proceedings, I would have done whatever I was Ordered to do by the Court." (ODC Exhibit #3, p. 58.) However, at the hearing, Respondent was confronted by the letter he had written to Ms. Miller on September 26, 2006 stating, "presumably you have a bankruptcy attorney, and if so, that person should call me so I know whether or not a check can be written to you." (ODC Exhibit – Burke #9, p. 296.) Respondent then admitted that the Affidavit, at least, was in his files at the time he settled for $75,000.00 with one of the defendants. (TR, Nace p. 349.) Also, by the time of the hearing in this matter, Respondent testified he had found the Application to Employ and

proposed Order. (TR, Nace pp. 274-275.) Thus, as developed during the hearing, Respondent's initial defense that he had no knowledge of the bankruptcy proceedings at the time of the $75,000.00 partial settlement and that he had no documents in his file reflecting any bankruptcy proceedings was false.

A jury trial was held against the other defendants and a verdict reached in favor of Ms. Miller on November 9, 2006, in the amount of $500,000.00. The jury verdict was later appealed and denied by the Supreme Court of Appeals of West Virginia on February 12, 2007. After the appeal was denied, Respondent received $425,000.00 plus interest for the verdict in the matter, reflecting an offset by $75,000.00 because of the earlier settlement. Respondent also did not submit this money to the bankruptcy estate. (TR, Nace p. 294.)

Ultimately, then, as a result of Respondents failure to maintain his files and take notice of the documents in his file that would have reminded him of the Miller bankruptcy proceedings and his employment as special counsel to the Trustee, the Trustee did not receive the funds from the medical malpractice case. The Trustee has now filed an adversary proceeding in the bankruptcy court against Respondent and Mr. Burke to recover that money.

Respondent's misconduct, as described above is a violation of duties owed to his client. His failure to recognize his misconduct and his false statements regarding his knowledge of the bankruptcy violated

duties he owed to the legal system. Respondent's misconduct also violated duties owned to the public because the public is entitled to be able to trust lawyers to protect their property. In this regard, lawyers are to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud or interference with the administration of justice. Finally, Respondent has violated his duties to the profession by failing to turn over the money to the bankruptcy court and failing to maintain the integrity of the profession.

B. Respondent acted negligently.

ABA Standards for Imposing Lawyer Sanctions define negligence as the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in that situation. Clearly, this explains Respondent's omissions in this case. At the very least he had an obligation to maintain his client files and check the files. Had he done this in the Miller case, he would not have overlooked his employment as special counsel to the bankruptcy Trustee. He also had a responsibility to learn his obligations and duties as special counsel.

C. The amount of real injury is great.

Respondent failed to turn over any of the $500,000.00 plus interest he received from Ms. Miller's medical malpractice case to the Trustee. As a result, the Trustee has not been able to resolve the claims against the bankruptcy estate and no creditors have received any of their portion of that money. Further, the Trustee has had to file an adversary proceeding against Respondent and Mr. Burke to recover those funds.

D. Mitigating Factors.

Mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Lawyer Disciplinary Board v. Scott,* 579 S.E.2d 550, 557 (W.Va. 2003). The following mitigating factors are present: absence of a prior disciplinary record and reputation. Respondent has been licensed to practice law in West Virginia since March 19, 1997, and has no prior discipline from either the Investigative Panel of the Lawyer Disciplinary Board or the West Virginia Supreme Court of Appeals. Respondent is also licensed to practice in Washington D.C., Maryland and Pennsylvania. He has no history of any ethics violations in these jurisdictions. There is also no dispute Respondent has an excellent reputation as a lawyer representing plaintiffs in medical malpractice actions.

E. Aggravating Factors.

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure requires aggravating factors to be considered. Similar to mitigating factors, aggravating factors "are any consideration or factors that may justify an increase in the degree of discipline to be imposed." *Scott, supra* at 557, quoting, *ABA Model Standards for Imposing Lawyer Sanctions,* 9.21 (1992). The aggravating factors present in this case include Respondent's failure to accept any hint of responsibility or acknowledgment of misconduct; his expedient, disingenuous, and false statements during this proceeding; and his substantial years of experience.

Throughout these proceedings, Respondent has refused to acknowledge the slightest blame or fault for failing to keep the Trustee informed about the Miller malpractice case and failing to obtain approval prior to settlement, and prior to disbursement of the settlement and judgment proceeds. Instead, Respondent blames the Trustee for failing to properly supervise *him* and failing to notify and contact *him*. (TR, Nace, pp. 329-334; Nace Exhibit #2; and Respondent, Barry J. Nace's Finding of Fact and Conclusions of Law and Recommended Decision pp. 41-45.)[3] But as Mr. Trumble pointed out in his letter to the ODC dated September 3, 2009, it is the attorney, not the

[3] The Hearing Panel Subcommittee makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter.

client, who is obligated by the Rules of Professional Conduct to act with reasonable diligence and to reasonably keep his client informed. (ODC Exhibit #5, p. 67.)

The Hearing Panel Subcommittee also does not confuse maintaining a defense to ethics charges with a failure to accept responsibility. However, there is a difference between an honest defense to the factual allegations and denying the truth of certain facts. Respondent claims no knowledge of the bankruptcy proceedings and the Hearing Panel Subcommittee believes this to be true. At the same time, Respondent had no knowledge because of his failure to maintain his client files and take notice of the documents in the files that would have reminded him of his employment as special counsel, including, at the very least, the Affidavit where he agreed to such employment. Yet, Respondent does not even acknowledge this responsibility or this failure.

Further, Respondent replied to the initial ethics complaint in this matter by letter dated August 4, 2009. In that letter Respondent stated when he made the distribution of the $75,000.00 partial settlement he did not know then about the bankruptcy; that "Mrs. Miller *never* mentioned anything about a bankruptcy to me, . . . [and] [h]ad I been aware then or at any time that she was in bankruptcy proceedings, I would have done whatever I was Ordered to do by the Court." (ODC Exhibit #3 p. 58, paragraph 43.) Respondent attached to this letter a copy of the Statement of Account showing the distribution of the

$75,000.00 and a copy of the check to Ms. Miller for her share of the proceeds. However, since Respondents case was heard simultaneously with Michael Burke's case, the Hearing Panel Subcommittee discovered a September 26, 2006 letter from Respondent to Ms. Miller in ODC exhibits for Mr. Burke. This letter had been provided by Mr. Burke in his response to the ODC. (ODC Exhibit – Burke #9, p. 296.) With the September 26, 2006 letter, Respondent enclosed a release for Ms. Miller to sign, discussed the amount she would receive from the settlement, and stated "[p]resumably you have a bankruptcy attorney and if so that person should call me so I know whether or not a check can be written to you." Obviously, then, Respondent knew at that time of the bankruptcy and that maybe the bankruptcy estate and not Ms. Miller should receive the proceeds. Notably, however, when Respondent was confronted with this letter at the hearing, he avoided responding to the question about whether he did in fact have knowledge of the bankruptcy proceedings at the time of the $75,000.00 settlement. (TR, Nace pp. 345-348.)

What is even more troubling, is Respondent did not disclose the September 26, 2006 letter to ODC. In response to the Investigative Subpoena Duces Tecum (ODC Exhibit #8), Respondent produced several records and pleadings from the Miller medical malpractice case, including the Release of All Claims signed by Ms. Miller, an Agreed Final Order Approving Settlement of a Wrongful Death Claim as to Defendant City Hospital, Inc., and the Statement of

Account for distributing the $75,000.00 settlement money. But, he did not include the September 26, 2006 letter. When Respondent was asked about that at the hearing, he blamed counsel for ODC for not requesting it. (TR, Nace pp., 349-351.) Respondent then filed a post-hearing Affidavit emphasizing, again, that ODC had only requested his "Trumble file;" that ODC did not request his "'entire file' on the Miller matter . . . ;" and that he had only produced "some of my Miller file." (Nace Exhibit #44.) Respondent also stated he only produced what "I thought would be relevant to this issue." (*Id.* at paragraph 18.) Apparently, he did not think the September 26, 2006 letter he wrote to Ms. Miller asking about the bankruptcy proceedings, which thereby demonstrated his knowledge of the bankruptcy proceedings at the time of the partial settlement, was relevant to the issue of his representation of the bankruptcy Trustee. Clearly, Respondent's excuse for failing to disclose the September 26, 2006 letter is disingenuous at best.

There can also be no question the September 26, 2006 letter was in Respondent's files because he produced this letter as an attachment to his post hearing Affidavit stating:

> 29. Included as *exhibit 1* are documents pertaining to the partial settlement of $75,000.00. These are in my Miller correspondence file, consecutively, and are attached so that one can see what was going

> on, in the file, around that period of time. Nothing has been taken out.
>
> 30. In the midst of this exhibit is the letter of September 26, 2006. . . .

(*Id.*)

In fact, whether documents are in Respondent's files is a recurrent theme in this case. Before being confronted at the hearing, Respondent testified that at the time of the September 2006 settlement, there was nothing in his files about the Miller bankruptcy (TR, Nace p. 285); yet he had signed the Affidavit consenting to be employed as special counsel approximately one and one-half years earlier on February 24, 2005. Respondent also maintained at his sworn statement to the ODC that he never received the Application to Employ Special Counsel or the proposed Order from the Trustee (ODC Exhibit #9, p.124); yet the Application to Employ Special Counsel has attached to it a Certificate of Service to Respondent dated January 27, 2005 (ODC Exhibit #1 pp.14-15) and in Respondent's deposition in the bankruptcy adversary proceeding, he admitted his office address on this Certificate of Service was correct. (Nace Exhibit #3 pp. 64-65.) Nevertheless, by the time of the hearing, both the proposed Order and the Application served January 27, 2005 had been "found" in Respondent's files. (TR, Nace pp. 274-275, and 344-345.)

Respondent also claims he did not receive the entered Order Authorizing Trustee to Employ Special

Counsel. However, given the documents that Respondent claims he never received because they are not in his files, yet later turn up in his files, this claim is not credible. Further, Respondent's argument that he did not know he was employed as special counsel because he did not know the Order had been entered by the Court is disingenuous. In the first place, Respondent admitted he knew nothing about bankruptcy law and further admitted he did not even know that such an Order was a prerequisite to being employed. (TR, Nace pp. 277-278.) Moreover, had Respondent known this, a reasonably diligent attorney, upon consenting to be employed, would have followed up to determine if the Order had been entered. Respondent never did this.

Respondent also denies receiving from Mr. Burke the May 18, 2005 and July 27, 2007 letters from Mr. Trumble inquiring about the status of the Miller case. Of course, if these letters were "found" in Respondent's files, there would be no question Respondent had knowledge and notice of the bankruptcy and his employment as special counsel to the Trustee. However, as with the Application, proposed Order, and Order entered and served by the Court, Respondent claims he never received these letters. The Hearing Panel Subcommittee finds the claim that Respondent did not receive two letters mailed and faxed to him two years apart incredible. Mr. Burke testified he instructed his secretary to mail a copy of the May 18, 2005 letter to Respondent and his secretary even noted mailing this on May 23, 2005. The mailing was

not returned to Mr. Burke as undeliverable. Mr. Burke also testified on August 8, 2007 he faxed and mailed a copy of Mr. Trumble's July 27, 2000 letter to Gabriel Assad, an associate in Respondent's office. Respondent also conceded there had never been a problem with communication between his office and Mr. Burke's office and that it was perfectly acceptable for Mr. Burke to speak to an associate or a secretary if he was not available. (TR, Nace p. 309-310.) So, how does Respondent explain not receiving these letters mailed and faxed to him almost two years apart? It is the fault of Mr. Burke's secretary, Lacy Godby, and Respondent's associate, Gabriel Assad. (TR, Nace pp. 280-281.) He even blames Mr. Trumble's paralegal, Kristi Hook! (TR, Nace p. 338-337.)

F. Sanctions.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part, Committee on Legal Ethics v. Tatterson,* 319 S.E.2d 381 (W. Va. 1984), *cited in Committee on Legal Ethics v. Morton,* 410 S.E.2d 279, 281 (W.Va. 1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In syllabus Point 3 of *Committee on Legal Ethics v. Walker,* 358 S.E.2d 234 (W.Va. 1987), the Court stated:

> In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. *Daily Gazette v. Committee on Legal Ethics*, 326 S.E.2d 705 (W. Va. 1984); *Lawyer Disciplinary Board v. Hardison,* 518 S.E.2d 101 (W.Va. 1999).

The aggravating factors far outweigh the mitigating factors in this case and contribute substantially to the recommended discipline. Accordingly, the Hearing Panel Subcommittee recommends the following sanctions:

A. That Respondent be suspended from the practice of law for 120 days without any requirement for reinstatement;

B. That Respondent provide community service through pro bono work for a total of fifty (50) hours;

C. That Respondent satisfy any obligations imposed on him, if any, in any final disposition of the pending adversary proceeding filed by the bankruptcy trustee; and

D. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.16 of the Rules of Lawyer Disciplinary Procedure.

Entered this the 21st day of March, 2012.

Respectfully submitted,

The Hearing Panel Subcommittee

/s/ Debra Kilgore
Debra Kilgore, Esq., Chairman
Hearing Panel Subcommittee

/s/ Sean Francisco
Sean Francisco, Esq.

/s/ Cynthia Pyles
Cynthia Pyles, Lay Person

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th of January, 2013, the following order was made and entered:

Lawyer Disciplinary Board, Petitioner

vs.) No. 11-0812

Barry J. Nace, Respondent

On a former day, to-wit, November 30, 2012, came the respondent, Barry J. Nace, by J. Michael Benninger, Benninger Law, his attorney, and presented to the Court his motion to stay the disciplinary proceedings in the above-captioned matter, for the reasons stated therein. Thereafter, on December 7, 2012, came the petitioner, Lawyer Disciplinary Board, by Jessica H. Donahue Rhodes, Office of Disciplinary Counsel, and presented to the Court its written response in opposition thereto.

Finally, on December 7, 2012, came the respondent, by counsel, and presented to the Court his motion for leave to file a reply to the response and his motion for leave to file a supplemental record in this matter, and attached said supplement thereto. It is hereby ordered that the motion for leave to file a reply and the motion to file supplemental appendix be, and they hereby are, refused.

Upon consideration of the motion for stay, the Court is of opinion to and doth hereby refuse said motion to stay.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court [SEAL]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th of May, 2013, the following order was made and entered:

Lawyer Disciplinary Board, Petitioner

vs.) No. 11-0812

Barry J. Nace, Respondent

On a former day, to-wit, April 25, 2013, came the respondent, Barry J. Nace, by J. Michael Benninger, his attorney, and presented to the Court his petition for rehearing. Thereafter, on the 9th day of May, 2013, the response thereto, was filed by the petitioner, the Lawyer Disciplinary Board, by Andrea J. Hinerman, its attorney. Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for rehearing.

Thereafter, on April 26, 2013, came the respondent and filed with the Court his motion for stay of mandate pending application of a writ of certiorari, which being seen and inspected by the Court is hereby granted. Justice Ketchum and Justice Loughry would refuse the motion for stay of mandate.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court [SEAL]

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0812

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

BARRY J. NACE,

Respondent.

RESPONDENT BARRY J. NACE'S BRIEF

Counsel for Respondent Barry J. Nace:

J. Michael Benninger, Esquire
W.Va. State Bar No. 312
Daniel D. Taylor, Esquire
W.Va. State Bar No. 10165
Benninger Law
PROFESSIONAL LIMITED LIABILITY COMPANY
P. O. 623
Morgantown, WV 26507
(304) 241-1856
mike(@benningerlaw.com

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TABLE OF AUTHORITIES

[1] **RESPONDENT BARRY J. NACE'S BRIEF**

Now comes Respondent Barry J. Nace, by counsel, pursuant to this Court's Corrected Order dated November 7, 2012, and Rules 35 and 38, *West Virginia Rules of Appellate Procedure*, and files his brief in this lawyer disciplinary proceeding and in response to the Statement of Charges filed against him, the Report of Hearing Panel Subcommittee dated March 21, 2012, and the Brief of the Lawyer Disciplinary Board filed on December 7, 2012.

Statement of the Case

For more than 40 years, Respondent Barry J. Nace ("Nace") has been a tireless supporter of both the bench and bar. He has served his profession in a myriad of ways – from president of ATLA, now AAJ, to presenting educational seminars to others interested in trial practice. As president for two consecutive years of the National Board of Trial Advocacy, the ABA sponsored professional certifying agency for trial advocacy, Nace was instrumental in its advancement to a position of national recognition and prominence. In serving as president of the Metropolitan D.C. Trial Bar and appointed member of the D.C. Court of Appeals Unauthorized Practice of Law Committee, he

has consistently demonstrated his dedication to professionalism and ethics. However, his continued participation in the American Law Institute, the American Board of Professional Liability Attorneys and the National Board of Legal Specialty Certification hangs in the balance with the decision in this proceeding. This lawyer is not unethical; and his entire reputation and good standing in this Bar and in the Bars in Maryland, Pennsylvania and the District of Columbia would be stained with an adverse decision in this proceeding, where he, at most, made a mistake in not knowing or fully understanding the expectations of others with whom he had little or no communication.

[2] **Procedural History and Related Proceedings**

This lawyer disciplinary proceeding against Nace began as a result of the Bankruptcy Court's authorizing his appointment as Special Counsel to the interim bankruptcy trustee in his client's Chapter 7 case, under 11 U.S.C. § 327(e). All duties, legal and ethical, which Nace is charged with violating arose under the bankruptcy case. Thus, this proceeding falls squarely within the United States District Court's (and Bankruptcy Court's) original and exclusive jurisdiction as stated in 28 U.S.C. § 1334(e)(2) and is a "core proceeding" under 28 U.S.C. § 157(b)(2)(A) as it involves the administration of Nace's client's bankruptcy estate. However, without regard to jurisdiction, Robert W. Trumble ("Trumble") filed his Complaint with the Lawyer Disciplinary Board ("LDB") on July

13, 2009 (ODC Ex. 1, pp. 1-2), which resulted in the Statement of Charges filed with this Court on May 17, 2011.

In response thereto, Nace filed his Answer and Affirmative Defenses on July 13, 2011. Nace affirmatively asserted in the First Defense that, if it were later held that he was appointed as Special Counsel to the Trustee, he would assert a federal jurisdictional basis for removal. He also asserted *laches* and time bar under Rule 2.14, *West Virginia Rules of Lawyer Disciplinary Procedure*; estoppel based upon the conduct of Trumble; and lack of notice resulting in the absence of mutual assent to the formation of an attorney-client relationship between Nace and Trumble in the underlying Bankruptcy Court case. Nace affirmatively alleged in his Ninth Defense:

> [A]ny issue, error, mistake, problem or occurrence set forth in the Statement of Charges which affect the relationship between the complaining party and the Respondent were inadvertent, without Respondent's knowledge, unintentional and were not done in a manner or with a conscious state of mind which would support a finding of any violation of any West Virginia Rule of Professional Conduct in this case.

[3] The evidentiary hearing was held before the Hearing Panel Subcommittee ("HPS") on October 10, 2011. Prior to the hearing, Nace served his Motion to Dismiss Statement of Charges, asserting that the discovery materials failed to establish any "knowing

or intentional violation" of any of the rules cited in the Statement of Charges. The Motion to Dismiss was based upon the holding and *dicta* of this Court's decision in *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976), recently cited approvingly by the Office of Disciplinary Counsel ("ODC") in its brief in another disciplinary proceeding in this Court.

At the direction of the HPS following the hearing, Nace served his Findings of Fact and Conclusions of Law and Recommended Decision on December 21, 2011. His submission focused upon the relevant facts and captured his asserted affirmative defenses, the arguments made in his Motion to Dismiss, and the application of fact to law which he deemed necessary as part of this disciplinary proceeding. On January 10, 2012, Nace filed his Response and Objection to Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions. The HPS issued its Report of Hearing Panel Subcommittee on March 21, 2012. ODC then designated and submitted the adjudicatory record to this Court on March 23, 2012. On April 9, 2012, Nace filed Respondent's Rule 3.11 Objection.

Nace filed his Notice of Removal to the United States District Court for the Northern District of West Virginia, on April 24, 2012. This Court entered its Order Staying this Disciplinary Proceeding on May 7, 2012. The United States District Court filed its Order Granting Petitioner's Motion to Remand on November 7, 2012. Upon receipt of the District

Court's Order, this Court entered its scheduling order on November 7, 2012. Nace filed his Notice of Appeal of the District Court's Order to the United States Court of Appeals for the [4] Fourth Circuit on November 21, 2012. On November 29, 2012, Nace filed his Motion for Stay with this Court. As of this date, the Court has not acted upon the Motion to Stay.

The undersigned is advised that a Motion for Rehearing has been filed by Michael D. Burke ("Burke") in the related disciplinary proceeding of *Lawyer Disciplinary Board v Burke*, ___ S.E.2d ___ (WV), (2012 WL 5479137) (decided November 9, 2012). The dissent in Burke's case appropriately focuses discussion on the application of the *Mullins* decision to the largely undisputed collection of facts in this case, which establish that, at most, Nace made a simple mistake or error that should not constitute a basis for discipline. Related judicial proceedings in which Nace and Burke were involved and are directly implicated by the Statement of Charges include: (1) Barbara A. Miller's ("Miller") Chapter 7 Bankruptcy Case docketed in the United States Bankruptcy Court for the Northern District of West Virginia, No. 3:04-bk-03365; and, (2) the bankruptcy adversary proceeding initiated by Trumble by his Complaint filed on October 5, 2010, against Nace and Burke alleging professional negligence and seeking recovery of money for Miller's bankruptcy estate docketed as Chapter 7 Bankruptcy Case No. 3:10-ap-00136. The record in this proceeding also references the State Court civil action filed on June 17, 2005, by Nace and

Burke in Miller's deceased husband's wrongful death medical malpractice case ("husband's case"), docketed in the Circuit Court of Berkeley County, West Virginia, Civil Action No. 05-C-418.

Record Factual Information

This disciplinary proceeding is unique due to the number of interconnected judicial proceedings and the relative roles, legal burdens and responsibilities, and relationships of each of the lawyers involved therein. This section, expressing the chronological background of the case, is broken into three subparts below.

[5] **(1) From Date of (Client) Miller Retention of Burke to Trumble's Knowledge of Nace**

For Nace and Burke, this case originated as an ordinary wrongful death, medical malpractice case, encompassed by the Wrongful Death Act, *West Virginia Code* §§ 55-7-5 through 8 and the Medical Professional Liability Act, *West Virginia Code* §§ 55-7B-1, *et seq*. Following her husband's death in 2003, Miller employed Burke to review her husband's case. She signed his standard contingency fee contract in her representative capacity as "admin'x of the Estate of Paul D. Miller" on February 5, 2004. Nace Ex. 2, ODC Ex. 19, p. 25, Hearing Transcript ("Tr.") 189. Thereafter, Burke obtained the medical records and sent them to Nace to "do an initial review" to determine whether he felt the case should be pursued. Tr. 192.

During their 20-year professional relationship in handling medical malpractice cases together, Burke typically received calls to his office concerning potential cases and he would screen them, "handle discussions with the clients, acquire the records, send the records" to Nace who then decided "whether to take the case." Tr. 192. This general process was utilized in the Miller case. Tr. 191.

On September 24, 2004, while Burke and Nace were still in the preliminary stage of reviewing her husband's case, Miller retained separate legal counsel[1] and filed her Bankruptcy Chapter 7 Voluntary Petition as a "no asset" case. ODC Ex. 19, p. 341. **SCHEDULE B – PERSONAL PROPERTY** attached to the bankruptcy petition listed "Malpractice Suit in re: deceased husband (D. Michael Burke, Attorney)" as property of the estate with an "unknown" current market value of Debtor's interest in the property. ODC Ex. 19, p. 352. Miller also filed a **SCHEDULE C – PROPERTY CLAIMED AS EXEMPT,** which specifically exempted the [6] "Malpractice Suit in re: deceased husband (D. Michael Burke, Attorney)" under the provisions of the *West Virginia Code* § 38-10-4 and stated "unknown" for both the value of the claimed exemption and the current market value of the exempt property. ODC Ex. 19, p. 354.

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[1] William A. O'Brien, Esquire, ("O'Brien") represented Ms. Miller in the preparation and filing of her petition and throughout the bankruptcy case. He had no contact with Respondent Nace throughout the entire period.

On the same date the bankruptcy case was filed, the Bankruptcy Court filed and served its **"Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines"** with its designation of the case as a "no asset" case. ODC Ex. 19, pp. 312 and 372; Tr. 56. 'The notice identified O'Brien as Miller's attorney and Trumble as Interim Bankruptcy Trustee, and scheduled the Section 341 Meeting of Creditors for October 21, 2004. The notice expressly provided the Bankruptcy Rule 4003 mandated 30-day deadline to object to exemptions claimed by Miller. ODC Ex. 19, p. 372.

During examination at the hearing in this proceeding, Trumble acknowledged that his duties as trustee in Miller's ease arose under Title 11 of the United States Code, (§704) and the Handbook for Chapter 7 Trustees ("Trustee Handbook"). Nace Ex. 2, Tr. 48-49. The trustee's duties relating to the debtor's claimed exemptions are set forth in two separate sections of the Trustee Handbook. Nace Ex. 2.

The first section, Chapter 6-DUTIES OF A TRUSTEE, mandates:

> 3. EXAMINING THE DEBTOR'S EXEMPTIONS AND STATEMENT OF INTENTION, § 704(3)
>
> . . . .
>
> *The trustee must object to improper debtor exemptions within 30 days after the conclusion of the § 341(a) meeting. . . . If the trustee does not file a timely objection to an*

> *exemption, it is deemed allowed.* See *Taylor v. Freeland and Krontz* [sic], 503 U.S. 638 (1992). [Emphasis added]

Nace Ex. 2, p. 6-5.

The second section, Chapter 8-ADMINISTRATION OF A CASE, states:

> [7] A debtor must list property claimed as exempt on the schedule of assets filed with the court. FRBP 4003(a). . . . *The trustee must object to improper debtor exemptions within 30 days after the conclusion of the § 341(a) meeting* or the filing of any amendment to the list or supplemental schedules, unless, within such period, further time is granted by the court. FRBP 4003(b). See FRBP 4003(b) and *Taylor v. Freeland and Krontz* [sic], 503 U.S. 638 (1992). . . . *If an objection is not filed in a timely manner, the exemption will be allowed by the court.*
>
> . . . .
>
> . . . . Section 522 sets forth allowable exemptions under federal bankruptcy law. *The trustee must know which states have opted out of the federal exemptions. If a state has opted out, the state property exemptions apply instead of those provided in 522(d), although other non-bankruptcy federal exemptions will apply,* . . . [Emphasis added]

Nace Ex. 2, p. 8-2.

Notably, *West Virginia Code* § 38-10-4(k)(2) provides any debtor domiciled in West Virginia may exempt an unlimited amount for "a payment on account of the wrongful death of an individual of whom the debtor was dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor," from the estate in the federal bankruptcy proceeding under the provisions of 11 U.S.C. § 522. The statutory exemption of wrongful death payments is significant because West Virginia is a "opt out" state under § 522; and her husband's case and payments it would produce were the precise subject matter for which Nace and Burke had been retained by Miller and is unlimited in amount. As noted below, her husband's case was also the same matter which Trumble sought to retain Burke and Nace as Special Counsel.

On October 21, 2004, Miller appeared at the meeting of creditors where she testified in support of her case. She signed an **AUTHORIZATION** permitting the release of documents and records relating to her husband's case to Trumble. ODC Ex. 1, p. 8. Tremble's first attempt to contact any attorney potentially involved in Miller's husband's case occurred five [8] days after the meeting of creditors when he sent correspondence dated October 26, 2004, to Mark Jenkinson, Esquire, at Burke's firm. ODC Ex. 1, pp. 6-7. Although the **SCHEDULE B – PERSONAL PROPERTY** listed Burke as counsel in her husband's case, Trumble sent correspondence to an attorney in his office that was unaware of Miller and

her case. ODC Ex. 19, p. 6-7, Tr. 193. There is no information developed in the record that Burke received the correspondence sent to his partner or otherwise learned of its existence. Other than a possible telephone call to Trumble to alert him that Mr. Jenkinson had no involvement in the case, no other response was made to the errant correspondence. Tr. 13 and 193.

Notably, Trumble's October 26, 2004, correspondence reads, "please advise me of your valuation as to the potential recovery which the Debtor may expect to receive as a result of this medical malpractice claim and whether this case is being handled by your office on a contingent or hourly basis," and, "I will advise you whether I intend to administer this claim as part of this Bankruptcy Estate or abandon my interest in the same." ODC Ex. 1, p. 7. Nace had no knowledge of this correspondence. Trumble's correspondence did not mention Miller's claimed exemption of her interest in her husband's case. Under bright line federal bankruptcy law, any interested party, meaning trustee or creditor, has only 30 days from the date of the meeting of creditors to object to a claimed exemption or the property or interest therein is no longer an asset in the Debtor's estate under Section 541.[2] Miller's interest in her husband's case was as the personal representative, the fiduciary and

[2] For reference in this case, Title 11, U.S.C. § 541(a)(1) provides that the estate includes, "all legal or equitable interests of the debtor in property as of the commencement of the case."

a potential statutory beneficiary. This would have been known to Trumble at the meeting of creditors. No other filings, including objections, were made in the bankruptcy case from the date of the meeting of creditors until the Bankruptcy Court entered the **DISCHARGE OF DEBTOR** on December 21, 2004, under [9] Section 727. ODC Ex. 19, pp. 312 and 380. Review of Miller's bankruptcy case filings, docket report and corresponding record reveals that neither Burke nor Nace was ever served with the **Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines** on September 27, 2004, or the **DISCHARGE OF DEBTOR** on December 23, 2004. Important for later discussion is that service of all Bankruptcy Court notices and orders is handled by an independent corporation under the Bankruptcy Noticing Center (BNC).[3] BAE Systems did so in the Miller bankruptcy case.

Further review of the record reveals that Trumble did two important things on January 11, 2005. At that time, it was 81 days post the Section 341 meeting of creditors held October 21, 2004, and 21 days post the Section 727 discharge of Miller as a Chapter 7 debtor, entered December 21, 2004. No objection was filed by Trumble or any other creditor as of

[3] The Administrative Office of the United States Courts contracted with BAE Systems, Enterprise Systems Incorporated, of Reston, Virginia, to manage the Bankruptcy Noticing Center (BNC) and to be responsible for mailing and electronic distribution of bankruptcy notices and orders.

January 11, 2005, to Miller's claimed exemption of her husband's case or to her discharge as an individual Chapter 7 debtor.

The first action of Trumble on January 11, 2005, was that he filed his **DESIGNATION AS AN ASSET CASE AND REQUEST TO ISSUE CLAIMS NOTICE** in Miller's bankruptcy case. ODC Ex. 19, p. 380. Trumble did not identify the asset he was claiming existed in Miller's bankruptcy case in the publicly reviewable record, nor did Burke or Nace receive service of Trumble's **DESIGNATION** or the **NOTICE OF NEED TO FILE PROOF OF CLAIM DUE TO RECOVERY OF ASSETS** and form Proof of Claim, issued by the Bankruptcy Court.[4] The document set identified as Document 9 on Miller's bankruptcy case [10] docket sheet in Bankruptcy Petition: 3:04-bk-00365 includes the Certificate of Service, which shows neither Burke nor Nace were served these important documents. ODC Ex. 19, pp. 311 and 315.

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[4] It is important that as a "no asset" case, the interim trustee receives $60 for his work. Nace Ex. 3, p. 17. In an asset case, he is entitled to a graduated percentage fee starting at 25% based upon recovery made by him or Special Counsel. Tr. 30-31, 11 U.S.C. §§ 330 & 326, Nace Ex. 2, p. 8-29. ODC elicited testimony from Mr. Trumble that the resulting unpaid creditor claims approximated $12,000, but his claim now included fees for his firm's representing him in the adversary proceeding at the time of the hearing in the amount of $62,487.00. Tr. 152; 158-161; 487. The amount claimed by Mr. Trumble's law firm now is greater than all debts and creditor claims filed initially in her bankruptcy case. ODC Ex. 19, p. 362.

The second action by Trumble (or actually his legal assistant) on January 11, 2005, was to send correspondence to Burke, with a copy to O'Brien. Nace Ex. 8. The letter contained a verbatim recitation of the October 26, 2004 correspondence mistakenly sent to Mr. Jenkinson, with the only change being that Burke was the new addressee. Again, Nace was not provided a copy and his involvement in the case was, indeed, unknown to Trumble at this time. Thus, Nace knew nothing of Miller's bankruptcy case nor Trumble's involvement until receiving his correspondence dated January 27, 2005.

By January 11, 2005, Trumble, as an interim trustee since 1994, and since his bankruptcy practice consumed "between 40 and 50 percent" of his time, would have known these important facts: (Tr. 46)

1. The case was designated "no asset" and discharged on December 21, 2004;

2. He knew absolutely nothing about the wrongful death case, its potential value (recovery), its chances of prevailing or the time period expected for action;

3. He had no contact with Nace or Burke about Miller's husband's case;

4. He had not objected to Miller's claimed exemption of her interest in her husband's case;

5. He had no factual basis on which to base a change in the designation of her case to one

with assets, since Nace was the only person evaluating her husband's case, and;

6. He had not publicly identified her husband's case as an asset of the estate in the designation filed with the Court.

This was the status of the case as of the date he decided to first contact Burke and to seek information about the husband's case.

[11] **(2) From Date of Trumble's Knowledge of Nace to Bankruptcy Court's Service of March 4, 2005 Order on March 6, 2005**

On January 25, 2005, Burke responded to Trumble's January 11, 2005, correspondence and stated:

> Dear Mr. Trumble,
>
> The potential claim of Barbara Miller is being investigated by Barry J. Nace, my co-counsel who is from Washington, D.C.
>
> Until the medical review is done, it will be impossible to evaluate her case or even the likelihood of recovery.
>
> Medical Malpractice cases do not settle with the same frequency that automobile accidents and other types of torts do.
>
> They are always very difficult cases, are hotly contested and result in trial more frequently tha(n)[sic] in settlement.

> I wish I could give you a more accurate picture of Ms. Miller's case, but unfortunately I am unable to do so.
>
> If you need any additional information, please do not hesitate to contact me.
>
> Sincerely,
> D. Michael Burke

ODC Ex. 1, p. 11. A copy of this correspondence was sent to O'Brien but not to Nace. ODC Ex. 1, p. 11. At the hearing, Trumble readily acknowledged that his receipt of Burke's correspondence of January 25, 2005, was "the first time that we had been introduced to Mr. Nace as co-counsel." Tr. 14, 62-63. On the other hand, Trumble testified that he has known Burke since moving to the Eastern Panhandle in 1992. Tr. 113. Trumble and Burke enjoyed both a social and professional relationship prior to the events giving rise to this case. Tr. 114. Trumble's prior experience with Burke was, "in a couple cases like this where he represented originally a client who had a personal injury case of some type and later declared bankruptcy." Burke confirmed he had done so on two or three occasions in personal injury cases. These cases did not involve Nace. Tr. 114-115, 193-4.

In contrast, Trimble admitted during the hearing, "I was not familiar with Nace's body of work prior to – prior to when Burke identified him as a co-counsel." Tr. 131.

[12] Understandably, because of their long-term, prior relationship in similar matters, Trumble

exclusively utilized Burke as the sole point of telephone contact and the individual to whom written requests for information about the case were sent. Tr. 77-78, 119, 192, 125-126. However, this does not justify him asserting, ODC arguing or HPS finding that contact with Burke was actual or constructive notice to Nace. Yet, it was Burke to whom Trumble turned initially in October of 2008 when the issues giving rise to the dispute in this case arose. Tr. 122-123.

Since Nace's state of mind and his actions here are under review, it is important to understand the long-term working relationship between Burke and Nace. At the hearing, Burke related he first met Nace in 1980 when Nace volunteered to teach a week-long trial practice seminar. Tr. 217. Burke regularly got Nace involved in his medical negligence cases as he was aware of Nace's reputation as "one of the most experienced and skilled medical malpractice lawyers for plaintiffs in this region." Tr. 218. Burke testified that Nace was honest and ethical and had a positive attitude toward and adherence for all the rules of professional conduct. Tr. 220. Located in West Virginia, Burke served as local counsel in the cases they shared.

Next, on January 27, 2005, Trumble's legal assistant forwarded to both Burke and Nace "an Application to Employ Special Counsel, Order and an Original Affidavit," in response to Burke's letter of January 25, 2005. ODC Ex. 1, p.12; Nace Ex. 10. The TRUSTEE'S APPLICATION TO EMPLOY SPECIAL

COUNSEL provided, "[T]he undersigned Trustee deems it necessary and in the best interest of this estate to employ D. Michael Burke, Esquire, and Barry J. Nace, Esquire as Trustee's legal counsel to pursue **the Debtor's personal injury claim as a result of a vehicular accident . . . "** ODC Ex. 19, pp. 381-382, Nace Ex. 10 [Emphasis added]. The affidavits provided to Burke and Nace were identical, provided no factual information about them or the matter at issue, and stated that they were "experienced in [13] rendering legal services of the same nature" for which they were being employed and that they were "willing to accept employment by the Trustee on the basis set forth in the Application to Employ filed simultaneously herewith." ODC Ex. 19, pp. 383-384[5]. The proposed ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL provided for the hiring of Burke and Nace to "serve as special counsel for the Trustee on a contingency fee basis in connection with the pursuit of **the Debtor's personal injury claim . . . "** [Emphasis added]. ODC Ex. 19, p. 392. Clearly these documents prepared by Trumble for submission to the Bankruptcy Court wrongly referred to Miller's husband's case as a "personal injury claim" due to a vehicular accident.

[5] The scant affidavits clearly did not meet the requirements of Bankruptcy Rule 2014 and provided the Bankruptcy Court with no clear information about the nature or scope of work for which the lawyers were being employed.

These documents are fatally flawed and are of no force and effect for the reasons cited below.

When asked at the hearing why he signed the Affidavit when he had no information about the bankruptcy case, it's Trustee or whether a viable medical legal ease existed at that time, Nace candidly stated:

> Because I recall calling up Mr. Burke and asking about this. 'I have this affidavit.' And basically he said to me, 'Well, you have to sign that and send it back.' I said, 'Okay.'
>
> At that point in time, when he started this in January of '05, I still had not taken the case. I was still at that point investigating, and I had not yet decided to take the case.
>
> Mr. Burke asked me to sign this because it was something that had to be done, and I did it. And I was satisfied if Mike thought I should do it, I'd do it. I had faith in Mike, so I signed it and sent it back. Tr. 276-277.

The record establishes that, at the time Trumble's legal assistant sent this document set to Nace, there had been no discussion or exchange of case information between Trumble and Nace [14] concerning Miller's husband's case. Nace had no knowledge of Miller's bankruptcy case and had never been served with any of the notices or orders entered in her case. In essence, these documents received were unexpected and foreign to Nace. Therefore, Nace acted reasonably when he called Burke, his long-time

friend, professional colleague and local counsel, to discuss what was required.

Based upon the assurances and instruction of Burke, the referring attorney who had previously communicated with Trumble a couple days before and had previously worked with Trumble as court appointed Special Counsel in other debtor claims, Nace signed and returned the Affidavit to Trumble on February 24, 2005. ODC Ex. 1, p. 20. For Nace to have contacted Burke to inquire about the bankruptcy documents sent to him unexpectedly by an attorney whom he had never met or spoken to seems reasonable under these circumstances. In hindsight, Nace, who is admittedly not knowledgeable about any aspect of bankruptcy law and who, unlike Burke, never had a client who filed bankruptcy, should have refused to sign the Affidavit indicating his "willingness" to accept employment. His signing of the Affidavit under these circumstances was an honest error and mistake – not unethical or negligent conduct. Each member of this Court and all experienced trial attorneys know it is common practice among lawyers with this level of expertise and decades of experience working as co-counsel to rely on each other to handle ministerial acts. Nace faithfully relied on Burke's direction to sign the Affidavit. This is certainly nothing sinister, negligent or unethical in having done so.

Nace's correspondence of February 24, 2005, to Trumble returning the signed Affidavit specifically stated as follows:

Dear Mr. Trumble:

Enclosed please find the signed Affidavit in the above captioned matter.

[15] I understand that Mr. Burke has already sent his Affidavit to you.

I would ask you to also note that I am a member of the West Virginia bar. *Also, please note that as of March 5, 2005 my office address will be changed to the following "1615 New Hampshire Avenue, NW, Washington DC, 20009*."

Very truly yours,
Barry J. Nace

[Emphasis added.] ODC Ex. 1, p. 20, Nace Ex. 13.

On March 4, 2005, without hearing, the Bankruptcy Court entered the Order authorizing Trumble to employee Burke and Nace as special counsel "in connection with the pursuit of the Debtor's personal injury claim." ODC Ex. 19, p. 393. Miller never had an individual personal injury claim; and the medical malpractice case arose from her deceased husband's last course of medical care and death and was not an individual claim that she possessed under West Virginia law. She employed Burke to pursue the investigation of her husband's case, as the administratrix of his estate. Her only individual interest in the matter was as one of the potential statutory distributee [sic] under *West Virginia Code* § 55-7-6(b). She had no individual right of action to pursue this case.

Yet, prior to the entry of the Order on March 4, 2005, the Bankruptcy Court was never specifically advised that the case for which Burke and Nace were being employed concerned a wrongful death case involving the debtor's deceased husband as opposed to a personal injury case involving the debtor individually. Nor was the Bankruptcy Court ever advised that Miller exempted her interest in the case with no objection to same. Consequently, the Bankruptcy Court had no reason to believe anything was amiss and had no notice that Trumble's filings were fatally flawed and unlawful, *ab initio*, and provided no legal basis to invoke jurisdiction over the wrongful death case as an asset of the estate under § 541.

[16] The certificate of service for the March 4, 2005 Order filed by BAE Systems on March 6, 2005, clearly shows that Nace was served by first class mail at the *wrong* address. Nace Ex. 41. Recall by correspondence dated February 24, 2005, Nace specifically advised Trumble that "as of March 5, 2005 my office address will be changed to the following '1615 New Hampshire Avenue, NW, Washington DC, 20009.'" Nace Ex. 13. In spite of being advised of Nace's address change, Trumble filed his application on March 3, 2005, and in it certified that service had been made upon Nace at "1814 N. Street NW, Washington, DC 20036," without providing notice to the Bankruptcy Court and BAE Systems of the important address change. This significant error provides the factual basis for the threshold legal State Court defense in

this case – Nace's lack of notice of being retained as Special Counsel, resulting in the absence of mutual assent to the formation of any attorney-client relationship.

Throughout this entire proceeding, Nace has maintained and argued that he never received the service copy of the Order entered by the Bankruptcy Court on March 4, 2005, which was served upon him at the incorrect address by BAE Systems on March 6, 2005. Tr. 319. Nace was unaware that any official action had been taken by the Bankruptcy Court with regard to the Affidavit he signed on February 24, 2005. Nace's position has been consistent and credible throughout this entire proceeding as demonstrated in his August 11, 2009 Verified Response to the Complaint, ODC Ex. 3, pp. 53-59, in his sworn statement to ODC, dated April 7, 2010, ODC Ex. 9, pp. 129, and during his hearing testimony on October 10, 2011, Tr. 318-319. Nace testified "I did not receive the signed order." Tr. 319.

In support of Nace's position, Trumble himself provided relevant deposition testimony in the adversary proceeding as follows:

> Q. Okay. Did you ever send Mr. Nace a copy of the order allowing you to employ him as special counsel?
>
> [17] A. I don't have any – I don't have any knowledge of doing that.
>
> Q. Do you have – did you have any communications with his office after the order

was entered on March 4th, 2005, about this case?

A. Not until October of 2008.

Nace Ex. 3A, pp. 43-44. Thus, there is no credible, admissible and reliable proof in this record that contradicts or negates Nace's assertion concerning his lack of contact with Trumble and that he did not receive any notice of entry of the March 4, 2005 Order. Even Burke testified that he did not believe Nace knew he had been appointed as Special Counsel. Tr. 233.

(3) No contact from Trumble after Entry of March 4, 2005 Order until November 2008

From February 24, 2005, until November 2008, Nace heard not one word from Trumble, from anyone in Trumble's office or from anyone at the Bankruptcy Court; nor did he receive a service copy of any notice or order filed in Miller's bankruptcy case. Actually, the last contact made with Trumble's office was by Nace in response to receipt of the document set containing the Affidavit, sent by his legal assistant. Although there were instances of correspondence sent by Trumble's office to Burke concerning the matter, there was never any telephone call or correspondence during this period of time exchanged between Trumble and Nace.

Specifically, the record establishes that on May 18, 2005, Trumble wrote to Burke regarding the

status of the husband's case. Nace was not copied on the letter. When asked why he did not send the letter to Nace, Trumble replied that, "I didn't know Mr. Nace. I was informed that Mr. Nace had to be employed as co-counsel, and so therefore we made the application to employ Mr. Nace." Tr. 23. He also said, "The second reason is I've dealt with Mr. Burke in the past. I've known him for years. He has represented me as a bankruptcy trustee [18] in other cases, so I'm familiar with his body of work." Tr. 23. He then admitted, "I felt that he [Burke] was familiar with the procedures utilized by a trustee when administering an asset of this nature. To be candid with you, it's more convenient than it is anything else." Tr. 23. Burke responded to Trumble on May 24, 2005, and provided an accurate status update on the case. ODC Ex. 1, p. 28; Nace Ex. 17. Again, no copy of Burke's correspondence to Trumble was ever sent to Nace.

By correspondence on June 13, 2005, Nace provided the Complaint to Burke to be filed in the State Court wrongful death case. Nace Ex. 17. The Complaint was filed by him on June 17, 2005, and the civil action was docketed as Case No. 05-C-418, in the Circuit Court of Berkeley County.

In March 2006, Miller testified at a deposition in her husband's case. She was asked on three occasions about her bankruptcy case. As Nace recalled at the hearing in the instant case, Miller testified that her bankruptcy case had been completed and her debts discharged. Nace Ex. 44, attachment 2, pp. 20-21. When confronted at the hearing with his September

26, 2006 correspondence to Miller concerning the pretrial settlement of $75,000.00 with the hospital and the statement therein, "presumably you have a bankruptcy attorney, and if so, that person should call me so I know whether or not a check can be written to you," he immediately recalled his client's deposition testimony.[6] TR. 347. Nace does not deny he was made aware of Miller's bankruptcy filing in February 2005 when he received and signed the Affidavit sent to him by Trumble's office. Yet, ODC and HPS have refused to simply accept the record facts that Nace heard and received nothing about the case, from the Bankruptcy Court, from Trumble or from Burke, until November of 2008 and honestly believed that his client's [19] case had been completed. Only a careful and diligent review of this entire record by this Court can rectify the improper characterization of this issue. Thereafter, Circuit Judge Sanders entered the Final Order Approving Settlement of Wrongful Death Claim, directing that attorney fees and expenses be paid, together with all liens for medical bills, funeral bills and burial expenses, and "that the remainder of the settlement proceeds shall be distributed according to the law of intestacy." ODC Ex. 10, pp. 52-55. There was no suggestion that Nace failed to safeguard the proceeds and distribute

[6] Had Miller done what Nace had requested, now we know O'Brien would have confirmed that her bankruptcy case was completed and her husband's case was exempt and not a part of her 541 estate.

them in accordance with Judge Sander's order. The trial of Miller's husband's case resulted in a favorable jury verdict on November 9, 2006. ODC Ex. 16, pp. 446-448. Judge Sanders entered the Judgment Order on January 4, 2007. ODC Ex. 16, pp. 449-453, and this Court rejected the petition for appeal on February 12, 2008. ODC Ex. 16, p. 497. Nace again properly safeguarded and handled all monies received; and there is no suggestion that he acted dishonestly or negligently in this regard. The pre-trial settlement and the trial and jury verdict all occurred long before Trumble ever again attempted to contact Burke about the status of the case. Contrary to what ODC argues, Nace would have had no reason, whatsoever, to avoid Trumble if he had simply been contacted about the case.

ODC argued, and HPS concluded, that somehow Nace had received Trumble's correspondence sent to Burke on July 27, 2007, by eliciting testimony that Burke had instructed his legal assistant to send same to Gabriel Assaad ("Assaad"), an associate in Nace's office at the time. Tr. 201, 204. There was reference made by ODC to a fax cover sheet dated August 8, 2007, which was in someone else's handwriting, "Per Gabe, send it to him. He will handle." Tr. 215. Another note in Burke's file referred to by ODC indicated that Trumble's July 27, 2007 letter was "mailed to Gabe and faxed." Tr. 215. Neither of these writings contained Burke's handwriting, and he admittedly did not communicate directly with Respondent Nace concerning [20] receipt of Trumble's correspondence.

The documents amount to nothing more than double hearsay without any corroboration. Neither Assaad nor Burke's legal assistant were called by ODC to testify to these acts or to authenticate the writing. Nace denied receiving the July 27, 2007, correspondence. Tr. 292. It defies logic to believe that, had Nace received a fax concerning Miller's husband's case or a message regarding same, he would not simply have called Burke and advised him that the case had been settled and the balance tried to jury verdict. Had the information been communicated as suggested by ODC, Nace, Trumble and Burke would all have been happy to discuss the positive result in her husband's case. Trumble even acknowledged that Nace certainly earned his fee; and there was no financial motive for Nace to have refused to communicate with him.

In spite of ODC's unsuccessful attempt to establish that Trumble's correspondence received by Burke was then sent to and received by Nace, the overwhelming weight of the evidence establishes otherwise because Assaad never worked on Miller's husband's case. Furthermore, there was nothing seen or recovered from a review of Nace's file to indicate that Assaad received and filed the documentation or brought it to Nace's attention; and Burke testified about the matter. Tr. 280. Most importantly, Burke testified unequivocally at the hearing that he and Nace never discussed the Miller case from June of 2005 until they received Trumble's "Second Request" letter in November 2008. Burke testified "I have no idea" whether or not his secretary faxed over or sent

over any correspondence to Gabe Assaad and whether it was ever received by Nace. Tr. 222-223. Burke further testified that, until November 14, 2008, when he received Tremble's Second Notice requesting a status update, he "assumed Mr. Trumble was keeping in contact with him on a regular basis as he had with me before I let his office know I was out." Tr. 250. Burke also testified at the hearing that he was not directed [21] by Nace to speak to Assaad about the case and that it was something that either he or his secretary did on their own. Tr. 2001. Also, Burke testified that it was his impression that Nace did not know he was working as attorney for the trustee. Tr. 231. The record reveals no reference to any testimony or documentation presented that any further contact was initiated by Trumble's office with Burke or Nace until the October 10, 2008, correspondence was sent to both. ODC Ex. 1, pp. 30-31.

This was puzzling because Trumble testified that he "learned that Mr. Burke had not been involved in the case prior to October 10, 2008." Tr. 135. Trumble further admitted that he kept no record or notes of any telephone calls he had in 2006 with Burke regarding the status of the case and Nace's involvement in it. Tr. 144. Not surprisingly, a copy of Trumble's October 10, 2008 letter was again sent to Nace at the wrong address, this time to 1814 "North" Street, NW, Washington, DC. ODC Ex. 1, pp. 30-31. It was not until Trumble's legal assistant sent correspondence dated November 14, 2008, again to Burke and Nace, now at his correct address, that Nace knew of

Trumble's inquiry and belief that he was his Special Counsel. ODC Ex. 1, p. 32.

Nace promptly responded to Trumble's correspondence by letter dated December 1, 2008, and indicated his willingness to collect the information sought. He requested that Trumble send him documentation supporting the assertions being made in his correspondence of October 10, 2008. In spite of the obvious failure of communication and lack of understanding among the lawyers involved, Trumble's correspondence dated January 5, 2009, to Nace with a copy to Burke directed Nace to place his legal malpractice carrier on notice and threatened that he, "will be contacting the appropriate state bars in which you are admitted to report your [22] disregard for the Rules of Professional Conduct as it relates to the representation of me as trustee with regard to this matter." ODC Ex. 1, pp. 36-37.

With correspondence dated February 4, 2009, Nace responded to the terse tone and aggressive and threatening statements contained in Trumble's January 5, 2009 correspondence and attempted to explain his understanding and knowledge of the events which had transpired over the years during his representation of Miller as the administratrix of her husband's case. ODC Ex. 1, pp. 48-50. Trumble did not respond to Nace's correspondence to explain his knowledge and interpretation of the events. Instead, he filed the instant ethics complaint on July 13, 2009, without first bringing the matter to the knowledge of the Bankruptcy Court, or filing a "turnover motion," or

seeking issuance of a rule to show cause, or even attempting to provide sufficient information so that Nace and Burke could attempt to resolve the matter. The matter involved a claim for monies potentially due to Miller's bankruptcy estate for her Section 541 "interest" in the settlement and verdict proceeds generated by the litigation efforts of Nace in the State Court wrongful death medical malpractice action, a claim which never lawfully existed in the first place. ODC Ex. 19, p. 354.[7]

The undisputed record evidence establishes that the wholesale lack of communication among the lawyers in this case is striking and profound, as it was clearly the duty of Trumble as interim trustee, the estate's fiduciary and as an officer of the Bankruptcy Court, to supervise his Special Counsel in the underlying State Court wrongful death case under 11 U.S.C. § 704 and the Trustee Handbook. Specifically, his duties are mandatory and clearly defined in [23] Chapter 8-ADMINISTRATION OF A CASE, Section M. EMPLOYMENT AND SUPERVISION OF PROFESSIONALS, Subpart 4. SUPERVISION OF PROFESSIONALS:

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[7] Trumble admitted that the goal of filing the ethics complaint was to recover money from Nace. Tr. 137. This was also the purpose of filing the Adversary Proceeding and claiming that Nace had acted negligently. ODC Ex. 17, pp. 280-285. Ironically, when Trumble served the application to retain his own firm to represent him as Special Counsel in the Adversary Proceeding case, he and the Bankruptcy Court again served Nace at the wrong address. This time, unlike the first, the undelivered mail was returned. ODC Ex. 19, p. 377.

> The trustee is a fiduciary and representative of the estate. *Trustees cannot avoid or abdicate their responsibilities by employing professionals and delegating to them certain tasks. It is critical that the trustee oversees the work performed by professionals and exercises appropriate business judgment on all key decisions.*
>
> *The trustee must actively supervise estate professionals to ensure prompt and appropriate execution of duties, compliance with required procedures and reasonable and necessary fees and expenses*. . . . [Emphasis added]

Nace Ex. 2, pp. 8-24.

Standard of Judicial Review and Burden of Proof

Since announcing its decision in *Committee on Legal Ethics v. McCorkle,* 192 W.Va. 286, 452 S.E.2d 377 (1994), resolving all doubts as to the applicable standard of review in lawyer disciplinary proceedings, this Court has consistently held:

> A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar [currently, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own

> independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

Syl. pt. 3, *McCorkle*; Syl. pt. 2, *Lawyer Disciplinary Bd. v. McGraw,* 194 W.Va. 788, 461 S.E.2d 850 (1995). In *Committee on Legal Ethics v. Blair,* 174 W.Va. 494, 327 S.E.2d 671 (1984), this Court described its ultimate authority in lawyer disciplinary proceedings and held: "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. pt. 3, *Blair.*

[24] This Court held in *Lawyer Disciplinary Bd. v. McGraw,* 194 W.Va. 788, 461 S.E.2d 850 (1995), that, "Rule 3.7 of the Rules of Lawyer Disciplinary Procedure requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence." Syl. pt. 1, *McGraw.* This Court has further stated that the factual findings and conclusions made by the Hearing Panel Subcommittee are subject to substantial deference so, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the [subcommittee panel of the Board]." *McCorkle,* 192 W.Va. at 290, 452 S.E.2d at 381; *see also, Lawyer Disciplinary Bd. v. Santa Barbara,* 229 W.Va. 344, 729 S.E.2d 179 (2012). These

standards and burdens have been faithfully applied by the Court in its most recent decisions in lawyer disciplinary proceedings through the end of 2012.

Summary of Statement of Charges

The investigative panel of the Lawyer Disciplinary Board issued its Statement of Charges on April 11, 2011. Respondent Nace was charged with violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5 (Fees), 1.15(b) (Safekeeping Property), and 8.4(c) and (d) (Misconduct). Respondent Nace adamantly denies any knowing, intentional or negligent violation any of these specific rules of professional conduct and contends ODC has failed to prove any violation of them by clear and convincing evidence.

Summary of Argument

Nace is an active, experienced, dedicated, well-known and respected trial lawyer who maintains the highest professional and ethical standards as a core component of all aspects of his legal practice. The charges leveled against him accuse him of negligently and unethically representing a client. Under West Virginia law, an attorney cannot be guilty of negligence [25] unless he has formed an attorney-client relationship with a client and has breached a legal duty to him. *See, Jack v. Fritts,* 193 W.Va. 494, 457 S.E.2d 431 (1995). In this proceeding, Nace argues that no attorney-client relationship was ever formed with Trumble because the March 4, 2005 Order,

authorizing his retention as Specie Counsel is void *ab initio* and he was never advised that any action had been taken by the Bankruptcy Court to authorize his appointment, resulting in the absence of mutual assent required to establish this required contractual relationship. Absent an attorney-client relationship, no legal or ethical duties are required to be performed by an attorney.

Nace contends his duty of loyalty, diligence and competence was to his only client, Miller, as personal representative of her husband's estate and plaintiff in his case. The settlement and verdict proceeds were properly accounted for and distributed under Circuit Court Order. He has not stolen any money, lied to anyone, or knowingly and intentionally violated any order or law. Should this Court find his arguments to be lacking then, at worst, he made a mistake in not understanding his role and the expectations placed upon him by others with whom he had no communication.

Finally, HPS' statement that it "makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter" reveals its refusal to objectively evaluate and consider Nace's legitimate, credible factual and legal defense in this most important matter. It seems as though HPS was offended by the vigorous defense presented. Such action by the HPS is arbitrary and violates Nace's constitutional due process rights in providing a factual and legal defense to the charges and arguing same in mitigation.

[26] Statement Regarding Oral Argument and Decision

Nace asserts that oral argument is necessary pursuant to the criteria contained in Rule 18(a), West Virginia Rules of Appellate Procedure. ODC does not object to oral argument being granted, and it is understood that this Court has scheduled this case on the Court's argument docket for Tuesday, February 19, 2013.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO DETERMINE THE VALIDITY, CONSTRUCTION AND EFFECT OF THE BANKRUPTCY COURT'S MARCH 4, 2005 ORDER APPOINTING NACE AND BURKE AS SPECIAL COUNSEL UNDER 11 U.S.C. § 327(e) AND THEIR DUTIES AND RESPONSIBILITIES ARISING THEREUNDER.[8]

Since ODC has argued and HPS has found that Nace was appointed as Special Counsel under Section 327(e) pursuant to the March 4, 2005 Order, it necessarily follows that this Court is without subject

[8] In making this argument, Nace is not being disrespectful or unmindful of this Court's jurisdiction and its ultimate authority in lawyer disciplinary proceedings, but simply contends that the Order by which he was purportedly retained as trustee's Special Counsel must be first examined by the Bankruptcy Court.

matter jurisdiction to determine the validity, legal effect and construction of said Order. Jurisdiction is original and exclusively vested in the United States District Court and the Bankruptcy Court pursuant to the provisions of 28 U.S.C. §§ 1334(e) and 157. The mandatory jurisdictional enactment states, in relevant part:

> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –
>
> . . .
>
> (1) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

The Statement of Charges, the evidence presented at the hearing, HPS' findings, and the Complaint in the Adversary Proceeding bring this proceeding directly within this limited but specific jurisdictional arena.

[27] The Court will know from its careful review of the adjudicatory record in this matter that the ethics complaint filed by Trumble, the Statement of Charges, and the Complaint filed by Trumble in the Adversary Proceeding all arise from the same set of specific facts, circumstances and events involving Nace and Burke. Those relevant facts for the purpose of this argument are: 1) these lawyers represented Miller; 2) she filed a Chapter 7 bankruptcy case; 3) the lawyers were contacted by the interim trustee;

4) he sought their appointment as Special Counsel under § 327(e); and, 5) they allegedly failed to perform their duties thereunder. Therefore, it is respectfully argued that this Court wholly lacks subject matter jurisdiction to determine whether Nace was actually appointed as Special Counsel under § 327(e) and whether he was negligent in the performance of his duties as argued by ODC and concluded by HPS in this proceeding. If the Bankruptcy Court ultimately decides he was appointed and acted improperly, then the matter should be referred to this Court or ODC and LDB for investigation.[9]

[9] Also, please compare the procedural and factual circumstances presented in *Lawyer Disciplinary Board v. Smoot,* 228 W.Va. 1, 716 S.E.2d 491 (2010), where the United States District Court took official action and entered an Order indicating that Mr. Smoot's failure to comply with an order was a basis for sanctions, but untimely raised, and then directed the file be made available to ODC "for such action as that agency deems appropriate." Here, the Bankruptcy Court has not yet made any such reference or finding against Nace.

II. TRUMBLE WAS NOT NACE'S CLIENT IN THIS CASE FOR PURPOSES OF APPLICATION OF THE RULES OF PROFESSIONAL RESPONSIBILITY BECAUSE:

(a) AS TRUSTEE, HE HAD NO RIGHT OR AUTHORITY TO ASSERT CONTROL OVER MILLER'S INDIVIDUAL INTEREST IN THE WRONGFUL DEATH MEDICAL MALPRACTICE CASE AS SAME WAS EXEMPT AND NOT AN ASSET OF THE ESTATE UNDER § 541

As noted above, Miller and her bankruptcy counsel properly and timely filed the schedule of estate property and claimed exemptions under *West Virginia Code* § 38-10-4 and 11 U.S.C. § 522(b). Trumble failed to object to the claimed exemption of her husband's case. *See,* § [28]522(l). Under Bankruptcy Rule 4003 and the holding in *Taylor v. Freeland & Kronz,* 503 U.S. 638, 112 S.Ct. 1644 (1992), which held:

> A trustee may not contest the validity of a claimed exemption after the Rule 4003(b) 30-day period has expired, even though the debtor had no colorable basis for claiming the exemption.

Id. at 644. The *Taylor* holding was applied by Bankruptcy Judge Flatley in the Northern District of West Virginia in *In re Stout,* 348 B.R. 61 (2006), where he said, "the court cannot ignore the holding of the supreme court in *Taylor v. Freeland & Kronz* . . . which denied a bankruptcy trustee's untimely objection to

exemption even though the debtor had no colorable statutory basis for claiming the exemption," and then denied the relief sought by the trustee in the pending adversary proceeding.

Since Miller's individual interest in her husband's case as a potential statutory distributee and heir at law was exempt at the time Trumble sent the Affidavit to Nace for signature and at the time the Bankruptcy Court entered its Order, there was no property or interest in property relating to her husband's case which could or should have been deemed a part of her Section 541 estate. Trumble had no legal or ethical right or authority to claim Miller's individual interest as a potential statutory beneficiary or heir at law in her husband's case in her Section 541 estate. Also, as noted above, the Bankruptcy Court had no jurisdiction at that time over property not lawfully in the debtor's Section 541 estate. Therefore, the actions of both Trumble in seeking the appointment of Nace and Burke as Special Counsel and the Bankruptcy Court's entry of the March 4, 2005 Order are void *ab initio* under *Singh, infra.*

[29] **(b) BANKRUPTCY COURT LACKED JURISDICTION TO ENTER THE MARCH 4, 2005 ORDER AND, AS SUCH, IT IS VOID *AB INITIO* AND OF NO LEGAL FORCE OR EFFECT.**

In *Rutherford Hospital, Inc. v. RNH Partnership,* 168 F.3d 693 (4th Cir. 1999), the Court held:

> Under the federal bankruptcy laws, a debtor's estate consists, *inter alia,* of 'all legal and equitable interests of the debtor and property at the commencement of the case.' 11 U.S.C. § 541(a). The estate under § 541(a) succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case. *In re FCX, Inc.,* 853 F.2d 1149, 1153 (4th Cir. 1988).

On point here, the Court in *Rutherford* also held, "a bankruptcy court's jurisdiction does not extend to property that is not part of a debtor's estate." *Id.* at 699; *see also, In re Signal Hill-Liberia Ave. Ltd. Partnership,* 189 B.R. 648, 652 (Bkrtcy. E.D.Va. 1995); *In re Murchison,* 54 B.R. 721, 727 (Bkrtcy. N.D.Tex 1985). Miller's individual interest in her husband's case was not a part of her bankruptcy estate at the time Nace and Burke signed their Affidavits stating their willingness to accept employment and, on March 4, 2005, when the Bankruptcy Court entered its Order because Trumble failed to object to her exemption of it. *See, Taylor v. Freeland & Kronz, infra.*

In *Gardner v. United States,* 913 F.2d 1414 (10th Cir. 1990), the Court, in commenting upon the jurisdiction of the Bankruptcy Court, said, "[W]hen property leaves the bankruptcy estate, however, the bankruptcy court's jurisdiction typically lapses, . . . and the property's relationship to the bankruptcy proceeding comes to an end. *Id.* at 1518. In *Cissell v. American Home Assur. Co.,* 521 F.2d 790, 792 (6th Cir. 1975), the Court said, "a trustee may not sue

upon claims not belonging to the estate even if they were assigned to him by creditors for convenience or other purposes."

[30] Nace relies upon the holding in *Singh v. Mooney,* 261 Va. 48, 541 S.E.2d 549 (2001) to define void *ab initio* as the term is used here. Accordingly, the March 4, 2005 Order is void *ab initio* because it was entered "in the absence of jurisdiction of the subject matter" and "the court had no power to render it," or "the mode of the procedure used by the court was one that the court could 'not lawfully adopt.'" *Id.* at 551. The Court in *Singh* stated: "[t]he lack of jurisdiction to enter an order under of these circumstances renders the order a complete nullity and it may be 'impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.'" *Id.* at 551. Therefore, this Court must hold that the March 4, 2005 Order is void *ab initio* and created no attorney-client relationship between Nace and Trumble.

(c) THE ORDER SUBMITTED TO AND ENTERED BY THE BANKRUPTCY COURT ON MARCH 4, 2005, WAS FATALLY FLAWED AND UNLAWFUL AND VOID *AB INITIO* AND OF NO LEGAL FORCE AND EFFECT

The Bankruptcy Court, as with all courts, speaks and commands only through its orders. Here, the March 4, 2005 Order appointing Nace and Burke as Special Counsel was entered upon the application "to pursue the Debtor's personal injury claim as a result

of a vehicular accident." ODC Ex. 19, p. 387. ODC and Trumble now attempt to pass this procedural problem off as a simple clerical error. Even to this date, no one, including the Trustee who clearly had a duty to correct the error, has done so. The Order actually entered commands Nace and Burke to serve the trustee, "in connection with the pursuit of the 'Debtor's personal injury claim.'" ODC Ex. 19, p. 393.

As a matter of fact and law, neither Nace nor Burke could have ever complied with the commands of the Order because it was legally and factually impossible and impracticable to do so since no personal injury case ever existed in which Miller had an interest. This Court has recognized the doctrine of impossibility and impracticability and it should be [31] applied in this proceeding. *See, Waddy v. Riggleman,* 216 W.Va. 250, 606 S.E.2d 222 (2004). As no personal injury claim existed, it could not now, by legal fiction, be created and become a part of Miller's Section 541 estate. Under the rule in *Rutherford,* the Bankruptcy Court did not have jurisdiction to enter a lawful or enforceable order in a non-existent case or even one wholly exempted by the Debtor. Thus, the March 4, 2005, Order was void *ab initio* and had no effect on Nace or Burke and created no ethical or legal duties to perform.[10]

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[10] The fatal flaws in this Order also negatively affect the mutual assent required in the formation of the attorney-client relationship with Trumble which ODC strives to prove and Nace denies ever existed.

(d) THERE WAS A CONFLICT OF INTEREST WHICH PREVENTED NACE AND BURKE FROM BEING APPOINTED AS SPECIAL COUNSEL UNDER § 327(e) SINCE MILLER WAS ACTING AS THE PERSONAL REPRESENTATIVE OF HER HUSBAND'S ESTATE AND NOT INDIVIDUALLY IN THE WRONGFUL DEATH CASE AND WAS THE FIDUCIARY FOR ALL POTENTIAL STATUTORY DISTRIBUTEES.

Assuming *arguendo* that Miller's individual interest in her husband's case was not exempted and became a part of her Section 541 estate, then she, as fiduciary for all other potential beneficiaries under *West Virginia Code* § 55-7-6(b), and Nace had a clear conflict of interest with the duties ostensibly owed to Trumble. The Bankruptcy Court in *In re Dow,* 132 B.R. 853 (Bankr. S.D.O. 1991), stated, "[p]ursuant to Section 541 and 704(1) of the Code, the trustee stands in the debtor's shoes and thereby is empowered to pursue the causes of action of the debtor." *Id.* at 861. In the instant case, this Court should harken back to its statement in *Sturm, infra,* that only the personal representative for a deceased can initiate a wrongful death action under West Virginia law and no individual claim can be pursued under the law of this State. In order to maximize the recovery for the debtor's estate, it is the duty of the trustee acting in place of the debtor, being represented by special counsel under § 327(e), to do all things necessary to place the debtor's interest in a position of advantage over the

other beneficiaries. [32] This places the debtor and the trustee in a direct adversarial position with the other individual beneficiaries. However, her highest legal duty as the personal representative and fiduciary under § 55-7-6(b) is to protect the interests of all beneficiaries. In sum, Nace could not represent Miller in both capacities under Rule 1.7.

It has been held that bankruptcy courts do not have the authority to allow employment of a professional who has a conflict of interest. *In re Mercury,* 280 B.R. 35 (2002); *see also, In re Federated Department Stores, Inc.,* 44 F.3d 1310, 1318 (6th Cir. 1995); *In re BBQ Resources, Inc.,* 237 B.R. 639, 642 (Bankr. E.D.Ky. 1999). The Court in *Mercury* stated, "to condone employment of an attorney who has a conflict of interest to assist the Chapter 7 trustee in her duties 'would erode the confidence of other parties in the administration of that estate to say nothing of public confidence in the administration of justice in bankruptcy courts.'" [Citations omitted.] *Id.* at 55. The Bankruptcy Court in *In re Southern Kitchens, Inc.,* 216 B.R. 819 (Bankr. D.Minn. 1988), stated that where an attorney had an interest adverse to the bankruptcy estate with respect to the matter for which he would be employed as Special Counsel, he then would be prevented from serving as such under § 327(e). A clear conflict existed in the instant case which makes the Order void *ab initio.*

III. TRUMBLE, AS INTERIM BANKRUPTCY TRUSTEE IN MILLER'S CHAPTER 7 CASE, EXCEEDED HIS POWER AND AUTHORITY TO ACT WHEN HE FILED THE ETHICS COMPLAINT AGAINST NACE AND BURKE; THEREFORE, THIS PROCEEDING MUST BE TERMINATED.

It is recognized by federal courts that a, "Chapter 7 trustee is an officer of the court." *See,* 18 U.S.C. § 153; *In re Grand Jury Proceedings,* 119 B.R. 945 (U.S.E.D. MI 1990). In *Evangeline Refining Co.,* 890 F.2d 1312, 1323 (5th Cir. 1989), the Court held, "when persons perform duties in the administration of the bankruptcy estate, they act as 'officers of the court and not private citizens.'" *Citing, Callahan v. Reconstruction Finance Corp.,* 297 U.S. 464, 468, [33] 56 S.Ct. 519 (1935). The Court in *Evangeline Refining Co.* stated also that, "as such, trustees and attorneys for trustees are held to high fiduciary standards of conduct." *Id.* at 1323.

In *Cissel v. American Home Assur. Co., supra.,* the Court held, "the trustee is a creature of statute and has only those powers conferred thereby." *Id.* at 792. *See also, In re Benny,* 29 B.R. 75, 760 (U.S.N.D. CA 1983). The trustee's limited enumerated powers are specifically defined by 11 U.S.C. §§ 704 and 541. Such enumerated powers do not include the right to file state legal ethics charges against special counsel to a trustee purportedly appointed under 11 U.S.C.

§ 327(e).[11] He, in essence, lacks legal standing to file the ethics complaint. *See, O'Halloran v. First Union Nat'l Bank,* 350 F.3d 1197, 1202 (11th Cir. 2003); *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards,* 437 F.3d 1145 (2006); *In re Beach First Nat. Bancshares, Inc.,* ___ F.3d ___ (WL 6720911, decided December 28, 2012) (trustee acquires no fights or interest greater than those of debtor under § 541 and only has standing to assert any cause of action which debtor could have brought). The exclusive jurisdiction for such action, is the United States Bankruptcy Court under 28 U.S.C. § 1334(e)(2), not this lawyer disciplinary proceeding. Therefore, this proceeding as it is now postured is constitutionally and procedurally defective.

[11] Instead of bringing the dispute to the Bankruptcy Court's attention by motion or otherwise, or continuing a dialogue with Nace and Mr. Burke, he instructed Nace to "place his malpractice carrier on notice," ODC Ex. 1, pp. 36-37, did not respond to Nace's correspondence of February 4, 2009, ODC Ex. 1, pp. 48-50, filed the instant ethics complaint on July 13, 2009, and initiated the adversary proceeding against the lawyers on October 5, 2010.

IV. NO ATTORNEY CLIENT RELATIONSHIP WAS FORMED BETWEEN NACE AND TRUMBLE BY THE MARCH 4, 2005 ORDER BECAUSE LACK OF NOTICE OF ITS ENTRY RESULTED IN THE ABSENCE OF MUTUAL ASSENT TO ITS FORMATION.

This Court knows that the existence of an attorney-client relationship is not determined by the rules of professional conduct. Whether an attorney-client relationship exists [34] for any specific purpose will necessarily depend upon the circumstances presented. This Court said in *State ex rel. DeFrances v. Bedell,* 191 W.Va. 513, 446 S.E.2d 906 (1994) that the relationship of attorney and client is a matter of contract, express or implied. A necessary prerequisite to the creation of such an important relationship is notice to the attorney that he has been employed, especially as here where Trumble lacked the legal capacity as trustee to hire Nace on his own, and such employment did not occur as a result of the signing of the Affidavit as ODC argues and HPS concluded. Trumble testified at the hearing that only the bankruptcy court could authorize such employment under Section 327(e); *see, Matter of Ladycliff College,* 35 B.R. 111, 113 (1983). Tr. 76; Nace Ex. 3, p. 34. Mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.,* 158 W.Va. 935, 216 S.E.2d 234 (1975). In *Ways v. Imation Enterprises Corp.,* 214 W.Va. 305, 589 S.E.2d 36 (2003), this Court said, "[t]he fundamentals of a legal 'contract' are competent parties, legal subject-matter, valuable consideration,

and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement." [Citations omitted.] *Id.* at 313. The record evidence in this proceeding proves conclusively that no contract existed between these attorneys because the subject matter of the endeavor belonged to the debtor individually and did not become a part of her trustee-controlled Section 541 bankruptcy estate.

V. NACE'S ONLY CLIENT WAS MILLER, AND HE DID NOT VIOLATE ANY LEGAL OR ETHICAL DUTY TO HER OR THE JUDICIAL SYSTEM AND WAS NOT NEGLIGENT OR DISHONEST, AS ARGUED BY ODC.

West Virginia Code § 55-7-6 sets forth the rights and mandatory procedures which must be followed in all wrongful death civil actions filed in this State. Of great importance here is the fact that, "[t]he West Virginia wrongful death statute envisions recovery [35] in the legal capacity of a personal representative rather than individually." *Strum v. Swanson,* 221 W.Va. 205, 216, 653 S.E.2d 667, 678 (2007). This Court has also stated under "our wrongful death statute, the personal representative has a fiduciary obligation to the beneficiary of the deceased because the personal representative is merely a nominal party and any recovery passes to the beneficiaries designated in the wrongful death statute and not to the decedent's estate." Syl. pt. 4, *McClure v. McClure,* 184

W.Va. 649, 403 S.E.2d 197 (1991). The personal representative's role in wrongful death cases was explained in *Trail v. Hawley,* 163 W.Va. 626, 628, 259 S.E.2d 423, 425 (1979), when this Court said that a wrongful death action "must be brought by the personal representative of decedent's estate; however the representative serves not as a representative of the deceased but as a trustee for the heirs who will receive any recovery." It was also emphasized "therefore, that the personal representative stands in a fiduciary relationship to the ultimate distributees and must act in their best interests." *Id.*

Nace and Burke this proceeding only represented Miller in her official capacity as personal representative and administratrix of her deceased husband's estate for purposes of the wrongful death action they pursued. Thus, it clearly follows that her only interest (for purposes of a Section 541 analysis as to what property or assets of her bankrupt estate could be accessed and controlled by Trumble as interim bankruptcy trustee) would have been her individual interest as one of the potential statutory distributees under § 55-7-6(b), and nothing more. As she had personal bankruptcy counsel attending to her individual interest in all matters of Debtor's estate property, Trumble had no authority to hire Nace or Burke to represent his interests as Trustee in the underlying bankruptcy proceeding. Having done so caused a clear conflict of interest and thrust Miller and her counsel into a breach of fiduciary duty scenario which is untenable under [36] any analysis of state or

federal law. Therefore, Trumble did not become Nace's client; and the order appointing Nace as Special Counsel was void *ab initio.*

VI. NACE OPPOSES THE FINDINGS AND RECOMMENDATIONS MADE BY HPS BECAUSE:

(a) HPS HAS WRONGFULLY SHIFTED THE BURDEN OF CONTROL AND SUPERVISION AND THE PERFORMANCE OF MANDATORY DUTIES IMPOSED UPON THE TRUSTEE TO HIM.

When the Court examines HPS' Report and the record, it will see the outright refusal to consider Trumble's coonduct [sic] in this case amounts to clear error and violates Nace's constitutionally protected due process rights. In not considering Trumble's conduct, HPS focused solely on Nace's actions and assertions presented in the defense of the charges. HPS failed to consider the undisputed and admitted fact that Trumble's power and duties as interim trustee emanated from § 704 and the Trustee Handbook. The handbook is clear that his non-delegable duty as an officer of the Bankruptcy Court and the estate fiduciary is to directly and actively supervise all professionals (lawyers, auctioneers, appraisers, *etc*.) retained under § 327(e). By only focusing on Nace's conduct, it wrongfully shifted the burden to him at the outset since he was only retained for a specific purpose, to-wit: the prosecution of the wrongful death case, and not to administer the debtor's

estate. It necessarily follows that Trumble's duties and responsibilities to supervise must have included communication with and a discussion as to his expectations, requirements and scope of work required of and from Nace. HPS has failed to consider that this specialized Bankruptcy Court relationship begins at a different point than the typical attorney-client relationship under state contract law and guided by the Rules of Professional Conduct. In normal cases, the attorney employed by a private citizen client has the affirmative duties to be diligent, competent and to communicate with his client. In the § 327(e) scenario, it is the interim trustee who bears the initial responsibility as supervisor, much like a [37] managing member in a law firm would have over a younger or less experienced attorney in his firm.

The fundamental disconnect between the typical attorney-client relationship as understood by most counsel and envisioned by the Rules of Professional Conduct and the special counsel relationship contemplated by federal bankruptcy law sets up the basis for contention between Nace and ODC and HPS and explains why his continued assertions have been found to be incredible and false and seen as an attempt to blame others. A careful review of the record does not support these findings.

(b) ODC HAS INCORRECTLY CHARACTERIZED HIS STRENUOUS ASSERTIONS THAT THE TRUSTEE FAILED TO PERFORM HIS MANDATORY DUTIES AS AN ATTEMPT TO SHIFT BLAME, ACCUSE OTHERS AND TO DENY RESPONSIBILITY WHEN THE RECORD PROVES OTHERWISE.

At each stage of the proceeding, Nace strenuously asserted that Miller was his only client and that he did not receive notice that the Bankruptcy Court took action to appoint him as special counsel to the interim trustee. During the hearing, specific facts were repeatedly developed to show that he was not contacted by Trumble or his staff or Burke or his client's bankruptcy attorney throughout the entire course of the wrongful death litigation. ODC and HPS concluded, albeit incorrectly, that Nace was being dishonest, attempting to blame others and presenting false testimony and documentation. This simply was not the case, and the Court must examine the record to determine deference is not justified and that such findings are unwarranted.

As it applies to mitigation and the overall tone of this proceeding, ODC and HPS recommend that Nace has denied responsibility, blamed others and shown no remorse for his actions. On the contrary, Nace has always accepted responsibility for what he did and knew in [38] this case. He admitted receipt of the affidavit he signed and returned to Trumble. There is nothing else he can or should say about that matter because that is all that was done. He certainly knew

that his client filed bankruptcy when he received the Affidavit and called Burke and was told to sign it. Aside from the initial information concerning his client's bankruptcy, the only other time he was confronted with the issue was during the Miller discovery deposition in the death case, more than a year later. This is what the record shows; nothing more. HPS finds he should have been more careful in reviewing his file and proactive in contacting Trumble to determine what course he should take. This finding is based upon its refusal to accept Nace's uncontradicted testimony that he never received the Order authorizing his retention. The record does not permit the HPS, on evidentiary grounds, to refuse to give any weight to his testimony on this point in the absence of contradictory testimony and evidence, which does not exist in this record.

Its findings about what Nace should have done demonstrate the complete shifting of the burden and diversion from the mandatory obligations of the trustee to control everything with regard to Nace's retention and the case he was required to prosecute on behalf of the debtor's estate. This all assumes that the husband's case and his client's interest in it was an asset of her bankruptcy case as has been ODC's contention and the express finding of HPS, both of which are clearly wrong as a matter of fact and law on the record as it is constituted now. The bottom line is that without examining Trumble's role and conduct in this case, there can be no proper resolution in this proceeding. The Bankruptcy Court is the required forum for this examination, and it will be done in

some proper form in the near future in the adversary proceeding Trumble initiated in 2010.

[39] **(c) HPS FAILED TO CONSIDER A NUMBER OF GENUINE MITIGATING FACTORS ESTABLISHED IN THE CASE AND IMPROPERLY ASSIGNED AGGRAVATING FACTORS TO HIM IN ITS CONSIDERATION OF THE SEVERE SANCTION IT RECOMMENDS.**

In accordance with the holding in *Lawyer Disciplinary Board v. Scott,* 213 W.Va. 209, 579 S.E.2d 550 (2003), where the Court applied factors under Rule 3.16 and adopted the mitigating factors proposed by the American Bar Association, *Standards for Imposing Lawyer Sanctions* (1992) Nace contends that HPS has failed to consider a number of important mitigating factors in determining its severe recommended sanctions. The mitigating factors which HPS did consider were his absence of any prior disciplinary record during his more than 40 years of active practice and his excellent reputation as a Plaintiffs' medical malpractice lawyer. It did not, however, consider his timely good faith effort to make restitution or rectify the consequences of his alleged misconduct when he submitted into Bankruptcy Court the amount finally received from Trumble represented as the creditor claims presented in the Miller bankruptcy case. Nace Ex. 1A. HPS also failed to consider the absence of any dishonest or selfish motive in the case. Trumble's testimony during the hearing establishes a factual

basis for this mitigating factor and its application to Nace. Tr. 182. Given the number of years devoted by Nace to the advancement of his profession in a number of important local and national legal organizations and the amount of voluntary service rendered by him, a four-month suspension of his license is unduly harsh. The punishment recommended does not fit the crime (mistake) in this case.

Lastly and most importantly, there was no harm to the trustee, the debtor's estate or the Bankruptcy Court in this case because Miller's husband's case and her interest in it was never an asset of the § 541 estate. Neither Trumble nor the Bankruptcy Court had jurisdiction over the property after it was exempted and no objection was filed within 30 days of the meeting [40] of creditors. Therefore, on the single most important aggravating factor found by the HPS in support of its recommended severe sanction, it was clearly wrong.

Conclusion

Nace requests that the Court dismiss this proceeding because no attorney-client relationship was formed and no ethical duties were violated. If the Court concludes otherwise, Nace requests that the Court consider his failures to be inadvertent mistakes and not disciplinable conduct. Should the Court disagree, then Nace requests that the mitigating facts outweigh the aggravating and a less severe non-suspension sanction be imposed.

Respectfully submitted,

/s/ JMB
J. Michael Benninger, Esquire
W. Va. State Bar No. 312
Daniel D. Taylor, Esquire
W.Va. State Bar No. 10165
Benninger Law
PROFESSIONAL LIMITED LIABILITY COMPANY
P. O. 623
Morgantown, WV 26507
(304) 241-1856
mike@benningerlaw.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Barry J. Nace, Esquire, do hereby certify that on January 7, 2013, the foregoing **Respondent Barry J. Nace's Brief** was duly served upon counsel of record by depositing a true and exact copy thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

Jessica H. Donahue Rhodes
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

/s/ JMB
Counsel for Barry J. Nace, Esquire

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0812

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

BARRY J. NACE,

Respondent.

RESPONDENT BARRY J. NACE'S PETITION FOR REHEARING

Counsel for Respondent Barry J. Nace:

J. Michael Benninger, Esquire
W.Va. State Bar No. 312
Daniel D. Taylor, Esquire
W.Va. State Bar No. 10165
Benninger Law
PROFESSIONAL LIMITED LIABILITY COMPANY
P. O. Box 623
Morgantown, WV 26507
(304) 241-1856
mike@benningerlaw.com

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Respondent.

RESPONDENT BARRY J. NACE'S PETITION FOR REHEARING

Now comes Respondent Barry J. Nace, by counsel, pursuant to Rule 25, *West Virginia Rules of Appellate Procedure,* and files his Petition for Rehearing in this lawyer disciplinary proceeding as a result of this Court's *per curiam* Opinion filed March 28, 2013.

Statement of Factual and Legal Basis for Petition

The entire set of operative and controlling facts and circumstances in this lawyer disciplinary proceeding arise from the bankruptcy case filed by Respondent Nace's client and his limited interaction with the interim trustee appointed to that bankruptcy case. Respondent Nace is of the opinion that in rendering its *per curiam* Opinion, this Court has overlooked and may have misapprehended the following material facts and points of law:

1. Respondent Nace's client, Barbara Miller, filed her Chapter 7 Bankruptcy Petition in September 2004, and his involvement in the bankruptcy case began when he received unsolicited correspondence dated January 27, 2005, together with documents, from the interim trustee appointed by the Bankruptcy Court in his client's bankruptcy case. ODC Ex. 1, p.12; Nace Ex. 10; Brief, p. 12.

2. Subsequent thereto, Respondent Nace was advised by his co-counsel, D. Michael Burke, to sign the affidavit provided by the interim trustee indicating his willingness to serve as Special Counsel and return it to the interim trustee as requested. Tr. 276-7; Brief, p. 13.

3. Without further notice to or contact with Respondent Nace, the interim trustee, on March 2, 2005, submitted his TRUSTEE'S APPLICATION TO EMPLOY SPECIAL COUNSEL, the Affidavits signed by Respondent Nace and Mr. Burke, a Contract of Employment and Authority to Represent dated February 5, 2004, and the ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL to the Bankruptcy Court for consideration pursuant to 11 U.S.C. § 327(e) and Rule 2014, *F. R. Bank. Pro.*

4. Without hearing, the Bankruptcy Court entered the ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL on March 4, 2005, and service of said Order was made upon Respondent Nace at the wrong address. Nace Exhibit 41.

5. In his brief and in oral argument, Respondent Nace presented record facts and evidence to this Court that:

(a) The ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL was entered improperly because the Bankruptcy Court lacked subject matter jurisdiction over his client's interest in her husband's medical malpractice wrongful death proceeds.

(b) He had been denied due process of law and there was a lack of mutual assent to the formation of an attorney-client relationship because he did not receive service of the ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL and any notice of or contact from the interim trustee until after the state court wrongful death case had been resolved.

(c) The interim trustee failed to perform and discharge his mandatory, nondelegable duties of supervision of and communication with Respondent Nace under 11 U.S.C. § 704 and the Handbook for Chapter 7 Trustees.[1] Nace Ex. 2; Brief, pp. 22-23.

(d) The interim trustee testified by deposition in the adversary proceeding filed in the Bankruptcy

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[1] Pursuant to Rule 5.1, *West Virginia Rules of Professional Conduct,* as adopted by L.R. Gen. P. 84.01, the interim trustee, as supervisory attorney, has additional ethical duties to employed Special Counsel.

Court and at the hearing in this lawyer disciplinary proceeding that he had no authority to hire Respondent Nace as Special Counsel under § 327(e) and Rule 2014 until the entry of the Order granting his application to do so. Tr. pp. 68, 69-70 and 76.

(e) No disciplinary proceeding has, to date, been initiated by the Bankruptcy Court against Respondent Nace concerning his actions as the appointed Special Counsel to the interim trustee.

(f) Dispositive motions were pending decision by the Bankruptcy Court regarding the validity of Respondent Nace's appointment as Special Counsel under § 327(e) and Rule 2014 at the time this Court filed its *per curiam* Opinion and when it previously denied Respondent Nace a stay of these proceedings.

6. The interim trustee's submission of his APPLICATION TO EMPLOY SPECIAL COUNSEL, the Affidavits and the Contingency Fee Contract and the Bankruptcy Court's entry of the ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL constitute core proceedings under 11 U.S.C. § 157(b)(2)(A).

7. This Court failed to consider substantial evidence of the number of mitigating factors under Rule 3.16, *West Virginia Rules of Professional Conduct* in the imposition of severe sanctions against Respondent Nace, which evidence consists of:

(a) The absence of any evidence of dishonest or selfish motive of Respondent Nace in this case. This

Court failed to appreciate that Respondent Nace did not in any way profit from the alleged misconduct, nor was there any suggestion that he charged an inappropriate fee or would not have been paid.

(b) During oral argument, the Court engaged in a dialogue concerning Respondent Nace's submission and payment of the amount (less than $20,000.00) claimed by creditors into the bankruptcy court system. This was done prior to the hearing and shortly after he finally received notice of the amount which was claimed to have been due the creditors in the case from the interim trustee. Nowhere in the *per curiam* Opinion is this evidence of restitution or elimination of harm mentioned, and such evidence certainly should weigh heavily in his favor in lessening the sanction imposed in this case.

(c) Contrary to the conclusions reached in the *per curiam* Opinion, Respondent Nace provided full and free disclosure to disciplinary counsel and demonstrated a cooperative attitude throughout the entire period of the lawyer disciplinary proceedings. The fact that he and his counsel vigorously defended the charges has, from the outset, been misconstrued as a lack of cooperation and an impertinent attitude toward the proceedings. These conclusions are not supported by the evidence and should be reconsidered by this Court as same are important in fashioning the sanction to be imposed in this case.

(d) Respondent Nace's character and reputation earned over four decades of active practice, without

any disciplinary blemish, is positive in all respects. He is highly esteemed among his peers and, at worst, this instance of negligence, by his failure to maintain a better filing system, his lack of communication with the interim trustee and his unintentional misstatements, is an aberration and does not reflect upon his overall personal and professional character and reputation.[2]

(e) Respondent Nace disputes he was intentionally untruthful at any time during these proceedings. In this regard, this Court has identified the statement made in haste in Respondent Nace's initial correspondence to the interim trustee concerning the settlement in the case. Respondent is a trial lawyer and thinks about cases in terms of verdicts rather than settlements. The statement should be reevaluated and understood to have been an affirmative declaration that the case had ultimately been resolved by trial and the significance, if any, of the prior settlement was not important to the overall communication being made to the interim trustee. This statement is borne out by a careful review of the interim trustee's correspondence sent in response wherein it was stated, "[w]hether it settled, tried to jury or resolved on appeal is irrelevant." ODC Ex. 1, p. 36. Respondent Nace's statement should not in any way be construed as being untruthful, especially when the interim trustee did not understand it in

[2] The Court will recall that it denied Respondent's request to submit supporting letters from prominent members of the bar.

that way. Regardless, the entire amount of the recovery was $500,000.00, and the amount of the settlement was offset and should have been considered of negligible importance when reviewing the entire record in this case. The Court should also clearly understand that, during his sworn statement given to ODC, he carefully explained the partial settlement, and the following questions and answers demonstrate that at no time did he attempt to avoid providing truthful information or avoid answering the questions concerning the settlement:

Q. [RHODES] Okay. And do you guys try to work settlement? You said one defendant did settle.

A. [NACE] City Hospital at some point – I can tell you – settled their part of the case – or I said settled it. They got out of the case. Their negligence would have been on the nurses.

And I guess we probably figured that they weren't quite as negligent as everybody else, so we settled the case with them for $75,000.

Q. Okay.

A. And I brought that stuff with me if you want to see that, too.

Q. I don't need to see it right now, but I can look at it later.

A. Okay.

Q. And then obviously with the other people you proceeded on to trials?

A. We proceeded. They didn't want to settle the case. And it turns out two of them were right, I guess, and the third one wasn't. and that's what happened.

ODC Ex. 9, pp. 135-136.

(f) Respondent Nace also corresponded with ODC by letter dated August 11, 2009, and provided all financial records relating to the settlement and verdict in the case and the distribution of the settlement proceeds. ODC Ex. 3, pp. 53-64. These matters are also of public record. Hence, it is an unfair characterization of the record to assign any dishonesty, fraudulent conduct or deceitfulness to these statements when none was intended. At worst, Respondent Nace was not as cautious or careful in his initial communication with the interim trustee as the situation may in hindsight have warranted.

(g) It is an unfair characterization of the record to conclude that Respondent Nace was not forthcoming with ODC or that he acted in a manner which hindered the investigation or was an obfuscation of the process by not providing his entire client file or that he had not received anything but the Affidavit from the interim trustee's office in January 2005. A careful review of the record reveals that the Investigative Subpoena *Duces Tecum* issued by ODC required Respondent Nace to produce "your complete client file relating to your representation of Robert W. Trumble

including financial records." ODC Ex. 8, p. 95. Mr. Nace clearly advised ODC during his sworn statement that he had not brought all the client files which consisted of four banker's boxes but, instead, he brought everything he thought would be relevant to the issue. The following question and answer demonstrates the disclosure clearly made by him:

> Q. [RHODES] Okay. And did you bring your client files with you?
>
> A. [MACE] I brought – well, my client files are about four boxes. So I brought everything that I thought would be relevant to this issue.

ODC Ex. 9, p. 101. He advised ODC that, due to the fact that he traveled by air, he had not brought all of the Miller client file with him and that he had brought only those documents he thought would be relevant to the issues at hand. At no time did ODC ask for anything else, even though Respondent Nace made an offer to provide any additional documentation which was deemed important. Respondent Nace always took the position with ODC, as he has with this Court, that Mr. Trumble was not his client and that he did not have a file created for his representation for him. It must be remembered that there was no communication whatsoever between Mr. Trumble and Respondent Nace beyond the letter received on January 27, 2005, and Respondent Nace's response to it in February 2005 until December 2008. By necessity, there would have been no file relating to the

representation of Mr. Trumble under the circumstances presented. In addition, the fact that other documents were found later in a separate part of the Miller case file does not establish that Respondent Nace was in any way less than forthcoming or being dishonest when he stated he had not received anything other than the Affidavit. This Court has been advised that, at worst, it was an oversight on Respondent Nace's part and a mistake not having corrected his statements prior to the time of the hearing, where he did so. A fair review of this record should reveal that the Court's conclusions in this regard are unjustified. Of particular importance, according to the *per curiam* Opinion, Respondent Nace always acknowledged signing the Affidavit and, in essence, for purposes of this Court's evaluation of the case, the other documents provided with the January 27, 2005 correspondence are of little importance.

(h) This Court unfairly cited to Respondent Nace's correspondence of September 16, 2008, as evidence of his lack of candor toward the proceeding and the court and that he had not fully produced documents subpoenaed by ODC. At all times, he denied that he had any role or part in the bankruptcy case or that he had been properly appointed and given notice that he had been appointed as Special Counsel to the interim trustee. A fair reading of the entire record supports this position. The fact that he mentioned bankruptcy to his client at the time of providing her guidance on the disbursement of the

settlement proceeds was nothing more than his attempt to make sure his client contacted her bankruptcy attorney to make sure the matter had been concluded. It was Respondent Nace's understanding that she had been discharged from bankruptcy and that she had previously testified in her deposition on March 16, 2006, that her bankruptcy proceeding "had been completed and your debts discharged." There is nothing in the record that establishes to any evidentiary standard that Respondent Nace's explanation of these events was anything but truthful. Therefore, this Court should not consider this information in a negative way in fashioning the sanction in this case.

9. This Court determined that Respondent Nace violated numerous Rules of Professional Conduct (including safekeeping of property) without first knowing to any reasonable certainty whether the Bankruptcy Court will ultimately determine that the interim trustee was entitled to assert any control or jurisdiction over the debtor's interest in her deceased husband's case. This matter was pending decision at the time this Court filed its *per curiam* Opinion.

10. Likewise, this Court has imposed a severe sanction against Respondent Nace in substantial part due to what was perceived to be substantial harm without first knowing to any reasonable certainty whether the Bankruptcy Court will ultimately determine the actual extent of the actual harm, if any, to the debtor's estate, the creditor or the interim trustee arising from the facts and circumstances being litigated at this time in the Bankruptcy Court.

Upon the factual information and legal assertions set forth above, Respondent Nace makes the following arguments:

I. THIS COURT ERRED IN HOLDING THAT THE VALIDITY OF THE MARCH 4, 2005 ORDER IS IRRELEVANT TO WHETHER AN ATTORNEY-CLIENT RELATIONSHIP FORMED IN THIS CASE.

Respondent Nace agrees with this Court's holding set forth in footnote 10 of its *per curiam* Opinion in that, "[t]his court does not have jurisdiction to determine whether the order was valid." He disagrees, however, with the balance of the holding, stating, [h]owever, the validity of the order is irrelevant to whether an attorney-client relationship formed in this case." Opinion, p. 21. This conclusion is contrary to federal law.[3] Federal law clearly determines whether an attorney-client relationship was formed in this bankruptcy case. It cannot rationally be argued or held that, without a valid ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL on March 4, 2005, pursuant to 11 U.S.C. § 327(e) and Respondent Nace's appointment as Special Counsel, there would have been an attorney-client relationship formed between Respondent Nace and the interim trustee under the facts of this case.

[3] In reality, this was an attorney relationship with another attorney supervisor (interim trustee).

The interim trustee's testimony in deposition and at the hearing in this lawyer disciplinary proceeding, as noted above, supports this position.

It has been held that, "[a] professional may not be employed by a trustee without the court's approval." *In Re: French,* 139 B.R. 485 (Bkrtcy. S.D. S.D. 1992). It has also been held that a professional's employment in a bankruptcy case is limited to the employment approved in the order authorizing the employment. *In Re: Computer Learning Centers, Inc.,* 285 B.R. 191, 205 (Bkrtcy. E.D. Va. 2002).[4] The purpose of court controlled employment of professionals, "assures proper management of the case and the professionals." *Id.* at 205. *See also, In Re: New England Fish Co.,* 33 B.R. 413, 420 (Bkrtcy. W.D. Wash. 1983). Therefore, only the Bankruptcy Court in this case can and should determine the validity of its Order authorizing the employment of Respondent Nace as Special Counsel to the trustee in this case. It is also the Bankruptcy Court, by virtue of its statutory authorization and inherent power, which must determine whether an attorney-client relationship was ever formed between its interim trustee and the Special Counsel it authorized him to employ and any ethical duties violated by him. Without a valid Order, Respondent Nace's willingness to accept employment cannot be perfected.

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[4] A review of the Order reveals that Respondent Nace was appointed to represent the interim trustee in a "personal injury claim." ODC Ex. 1, p. 26.

II. FEDERAL LAW, AND NOT STATE COMMON LAW, CONTROLS THE DETERMINATION AS TO WHETHER AN ATTORNEY-CLIENT RELATIONSHIP WAS EVER FORMED BETWEEN RESPONDENT NACE AND THE INTERIM TRUSTEE AND THE APPOINTMENT OF RESPONDENT NACE AS SPECIAL COUNSEL TO THE INTERIM TRUSTEE UNDER 11 U.S.C. § 327(e) IS A CORE PROCEEDING UNDER 11 U.S.C. § 157.

It is undisputed that Respondent Nace could only be appointed as Special Counsel under 11 U.S.C. § 327(e) and Rule 2014, *Federal Rules of Bankruptcy Procedure.* No state statute, rule, regulation or common law decision could play any part in Respondent Nace's appointment in this particular bankruptcy case, nor should any such state law be considered as having any part or role in the formation of this particular attorney-client (attorney) relationship formed in the bankruptcy case. Under § 327(e) and 11 U.S.C. § 157(b)(2)(A), the Court's appointment of Special Counsel for the interim trustee is a core proceeding for purposes of establishing bankruptcy court jurisdiction and determining whether an attorney-client relationship was formed. *See, In Re: Eckert,* 414 B.R. 404 (Bkrtcy. N.D. Il. 2009).

III. THE BANKRUPTCY COURT HAS THE SOLE JURISDICTION TO ACT WITHIN ITS INHERENT AUTHORITY TO INITIATE DISCIPLINARY PROCEEDINGS AGAINST RESPONDENT NACE IF IT IS DETERMINED THAT AN ATTORNEY-CLIENT RELATIONSHIP WAS FORMED AND THAT RESPONDENT NACE VIOLATED ANY ETHICAL DUTIES RESULTING THEREFROM.

The Supreme Court of the United States held, in *In Re: Snyder,* 472 U.S. 634, 105 S.Ct. 2874 (1985) that, "[c]ourts have long recognized an inherent authority to suspend or disbar lawyers" [citations omitted]. The Court further stated, "[t]his inherent power derives from the lawyer's role as an officer of the court which granted admission." *Id.* at 643.

In *McCallum v. CSX Transportation, Inc.,* 149 F.R.D. 104 (M.D. N.C. 1993), the District Court held that, "[t]he Supreme Court has made it clear beyond peradventure that a federal court's decision to admit to practice or discipline an attorney arises from an exercise of that court's inherent power" (citing, *In Re: Snyder, supra*). The Court also said, "[f]urthermore, the standards which arise from exercise of that power must be found in federal law." *Id.* The *McCallum* Court further stated:

> Inasmuch as neither Congress nor the Supreme Court have adopted a uniform set of federal ethical standards governing attorneys practicing in the federal courts, the various

> federal courts may look to the rules of the state in which that court sits or widely accepted national rules, such as the American Bar Association (ABA) Model Rules of Professional Conduct. **If a district court has adopted disciplinary rules in its local rules, it naturally will consult them to determine the appropriate conduct.** [Emphasis added.]

Id. at 108. The District Court for the Northern District of West Virginia adopted a code of professional responsibility in its local rules. *See,* L.R. Gen. P. 84.01. This local rule applies to the Bankruptcy Court involved in the instant case as it is an adjunct to or unit of the District Court. The analysis applied by the *McCallum* Court should be applied by the Bankruptcy Court here and requires, "[t]his court must look to federal law in order to interpret and apply those rules." *Id.* at 108. It concluded its analysis by stating, "[t]hat is, even when a federal court utilizes state ethics rules, it cannot abdicate to the state's view of what constitutes professional conduct, even in diversity cases" [citations omitted]. Therefore, "[w]hile this Court has adopted the [West Virginia] professional code as its code of conduct, it still must look to federal law for interpretation of those canons and in so doing may consult federal case law and other widely accepted national codes of conduct, such as the ABA Model Rules." *Id.* at 108.

IV. ALL ETHICAL STANDARDS IMPOSED UPON RESPONDENT NACE AS SPECIAL COUNSEL TO THE INTERIM TRUSTEE IN THIS CASE ARE A MATTER OF FEDERAL LAW.

It has been held that, "[a] federal court is not bound to enforce [a state court's] view of what constitutes ethical professional conduct." *County of Suffolk v. Long Island Lighting Company,* 710 F.Supp. 1407, 1413 (E.D. N.Y. 1989); *see also, Figueroa-Olmo v. Westinghouse Elec. Corp.,* 616 F.Supp. 1445, 1449-50 (D.P.R. 1985); *Black v. Missouri,* 492 F.Supp. 848, 874-75 (W.D. Mo. 1980). The Court, in *County of Suffolk,* also held, "the ethical standards imposed upon attorneys in federal court are a matter of federal law." *Id.* at 413, (citing *In Re: Snyder,* 472 U.S. 634, 643-45, n. 6, 105 S.Ct. 2874, 2880-81, n. 6 (1985)). Without a valid Order, the interim trustee could not hire Respondent Nace and a violation of any duties could not occur.

V. THIS COURT'S HOLDING THAT RESPONDENT NACE IS SUBJECT TO ITS DISCIPLINARY JURISDICTION AS A RESULT OF HIS FAILURE TO PERFORM DUTIES IMPOSED UPON HIM AS SPECIAL COUNSEL TO THE INTERIM TRUSTEE VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Supreme Court precedent makes clear that practice before federal courts, including bankruptcy

courts, is not governed by state court rules. The federal court has the power to control admission to its bar and to discipline attorneys who appear before it. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111 S.Ct. 2123 (1991). It is known that, "[b]ankruptcy courts also 'have the inherent power to sanction that Chambers recognized exists within Article III courts.'" *In Re: Lehtinen,* 564 F.3d 1052, 1058 (9th Cir. 2009).

State rules regulating attorney conduct are subject to operation of the Supremacy Clause. *County of Suffolk v. Long Island Lighting Company, supra,* at 1414. *See also, Surrick v. Killion,* 449 F.3d 520, 531 (3rd Cir. 2006). In *County of Suffolk,* the Court held, "[t]hus to the extent the enforcement of the state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement." 710 F.Supp. at 1415. In *Surrick,* the Court held,

> Under the Supremacy Clause, when state law conflicts or is incompatible with federal law, the federal law preempts the state law. Preemption generally occurs in three ways: (1) where Congress has expressly preempted state law; (2) where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; or (3) where federal law conflicts with state law.

Each of these categories of preemption is necessarily applicable in this case and this Court's actions usurping the Bankruptcy Court's authority and jurisdiction

over Respondent Nace's conduct while acting as Special Counsel violates the Supremacy Clause of the United States Constitution. *See also, Sperry v. State of Florida,* 373 U.S. 379, 83 S.Ct. 1322 (1963).

VI. A SPECIFIC FINDING OF BAD FAITH, WILLFULNESS OR RECKLESSNESS MUST BE MADE BY THE BANKRUPTCY COURT BEFORE PROCEEDING TO SANCTION RESPONDENT NACE UNDER ITS INHERENT POWERS.

In *United States v. Stoneberger,* 805 F.2d 1391, 1393 (9th Cir. 1986), the Court held, in an attorney disciplinary proceeding conducted in federal court, that, "[a] specific finding of bad faith, however, must 'precede any sanction under the court's inherent powers.'" The *Stoneberger* Court cited with approval the holding in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2465 (1980), as providing the legal basis for the bad faith requirement before an attorney may be sanctioned for misconduct in federal court.

The Court, in *In Re: Crayton v. United States Trustee,* 192 B.R. 970 (B.A.P. 9th Cir. 1996), held that, "[a]s a unit of the district court, pursuant to 28 U.S.C. § 151, a bankruptcy court is a federal court," for purposes of applying ethical discipline to attorneys practicing before it. The Court, in *Crayton,* cited the holding in *Stoneberger.* The Court, in *Crayton,* also noted that there were other measures of attorney conduct which may support sanctions, to-wit: willfulness and recklessness. *Id.* at 977. Accordingly, it is

the Bankruptcy Court for the Northern District of West Virginia which must first consider Respondent Nace's conduct to determine whether he violated any applicable rule of professional conduct and whether he did so in bad faith, willfully or in a reckless manner. These are the federal law standards for imposition of sanctions required to be established before an attorney can be determined to have violated any rule of professional conduct while practicing in Bankruptcy Court. Negligent conduct does not suffice.

VII. THIS COURT HAS VIOLATED RESPONDENT NACE'S PROCEDURAL DUE PROCESS RIGHTS PROTECTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Procedural due process requires Respondent Nace be given the opportunity to be heard at a meaningful time and in a meaningful way, and the opportunity to present evidence and have it fairly judged. *See, Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1992); *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *see also, In Re: Ruffalo,* 390 U.S. 544 (1968). This Court violated Respondent Nace's procedural due process rights when it failed to fairly judge, weigh and consider all of the mitigating factors established by the evidence presented in this lawyer disciplinary proceeding. It also violated his procedural due process rights when it failed to consider the acts and negligent conduct of the interim trustee in failing to supervise him and failing to communicate

effectively with him prior to and after the entry of the March 4, 2005 Order. Lastly, this Court violated Respondent Nace's procedural due process rights when it refused to grant him a stay so that the Bankruptcy Court could determine whether he was properly appointed as Special Counsel to the interim trustee and whether he violated any legal or ethical duties owed to the trustee or the Court. The Court also violated his due process rights when it determined that his conduct as Special Counsel in the Bankruptcy Court was negligent and that he was subject to discipline based upon that standard of proof and conduct, as opposed to allowing the Bankruptcy Court to act within its inherent powers under the applicable federal standard of proof. Therefore, in applying the protections afforded him under the Supremacy Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, this Court should stay the issuance of the mandate, remand this case to the Hearing Panel Subcommittee for further proceedings or dismiss this lawyer disciplinary proceeding without prejudice until the Bankruptcy Court for the Northern District of West Virginia initiates disciplinary proceedings against Respondent Nace and a final decision is rendered in said matter. It is also requested that the severe sanction imposed in this case be reduced to that which was levied in the *Burke* case.

Respectfully submitted this 25th day of April, 2013.

/s/ JMB

J. Michael Benninger, Esquire, WV ID # 312
Daniel D. Taylor, Esquire, WV ID #10165
Benninger Law
PROFESSIONAL LIMITED LIABILITY COMPANY
P. O. Box 623
Morgantown, WV 26507
(304) 241-1856
mike@benningerlaw.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Barry J. Nace, Esquire, do hereby certify that on April 25, 2013, the foregoing **Respondent Barry J. Nace's Petition for Rehearing** was duly served upon counsel of record by depositing a true and exact copy thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

Jessica H. Donahue Rhodes
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

/s/ JMB

Counsel for Barry J. Nace, Esquire

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0812

LAWYER DISCIPLINARY BOARD,

Petitioner

vs.

BARRY J. NACE,

Respondent

RESPONDENT BARRY J. NACE'S MOTION FOR STAY

Counsel for Respondent Barry J. Nace:

J. Michael Benninger, Esquire
W.Va. State Bar No. 312
Benninger Law
PROFESSIONAL LIMITED LIABILITY COMPANY
P. O. 623
Morgantown, WV 26507
(304) 241-1856
mike@benningerlaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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vs. **No. 11-0812**

BARRY J. NACE,

Respondent.

RESPONDENT BARRY J. NACE'S MOTION FOR STAY

Now comes Respondent Barry J. Nace, by counsel, J. Michael Benninger, pursuant to Rules 29 and 35, *West Virginia Rules of Appellate Procedure*, and moves this Court for entry of an Order staying the instant lawyer disciplinary proceeding until the latest of: (1) the final disposition of Respondent Nace's appeal of the Order Granting Petitioner's Motion to Remand entered by the United States District Court for the Northern District of West Virginia on November 7, 2012, currently docketed as Appeal Case No. 12-2441, Lawyer Disciplinary Board, Petitioner-Appellee v. Nace, Respondent-Appellant (3:12-cv-00033-GMG) in the United States Court of Appeals for the Fourth Circuit; and/or (2) the Bankruptcy Court trial or resolution by dispositive motion of the bankruptcy case, *In Re: Barbara Ann Miller, Debtor*, Bankruptcy Case No. 3:09-bk-00531/Trumble, Trustee, Plaintiff v. Burke, Nace, *et al.* Defendants, Adversary Proceeding No. 3:10-ap-00136, in the United States Bankruptcy Court for the Northern District of

West Virginia. This Motion is based upon the following:

1. Respondent Nace and his counsel filed a Notice of Removal on April 24, 2012, asserting that as a result of the Findings of Fact and Conclusions of Law contained in the Report of the Hearing Panel Subcommittee, there was a sufficient basis to remove the lawyer disciplinary proceeding under the authority of the holding in 28 U.S.C. § 1442(a)(3), and *Kolibash v. Committee on Legal Ethics of West Virginia*, 872 F.2d 571 (1989).

2. At all times in this lawyer disciplinary proceeding and in the Bankruptcy Court adversary proceedings, Respondent Nace acknowledged that he certainly represented Barbara Ann Miller in her official capacity as administratrix of the estate of her deceased husband in the state court medical malpractice case until it was finally resolved in 2008.

3. At no time did Respondent Nace represent Ms. Miller in her individual Chapter 7 bankruptcy case filed in September 2004, as she had separately retained counsel throughout that entire proceeding.

4. The ethics complaint in this case was filed by the Bankruptcy Trustee on July 13, 2009. Thereafter, on October 5, 2010, the Trustee filed an independent adversary proceeding in the underlying bankruptcy case, alleging that Respondent Nace and D. Michael Burke were negligent in their duties as Special Counsel in the bankruptcy case.

5. The Lawyer Disciplinary Board issued its Statement of Charges in this case on April 6, 2011, and filed same on May 17, 2011.

6. The Trustee admitted threatening and then filing the ethics complaint to recover money he felt was due the bankruptcy estate. Hearing Transcript, October 10, 2011, p. 133.

7. The Trustee admitted that he had no contact or communication with Respondent Nace from February 2005, prior to the entry of the Bankruptcy Order on March 4, 2005, until October 2008, regarding the bankruptcy case. Hearing Transcript, October 10, 2011, p. 133.

8. The Trustee admitted that the issue of Respondent Nace's duties and the extent of same and who owed any money to the bankruptcy estate "will play itself out in the adversary proceeding." Hearing Transcript, October 10, 2011, p. 141.

9. The Bankruptcy Court and/or District Court are the only courts with personal and subject matter jurisdiction under Title 11, *United States Code*, to address the serious preliminary issues of law and fact in this unique lawyer disciplinary proceeding, including:

(a) Whether Respondent Nace and D. Michael Burke were appropriate lawyers to become involved in the underlying bankruptcy case as Special Counsel because they only represented the debtor in her official capacity as administratrix of her deceased husband's estate, and

she was at all times only a potential statutory wrongful death distributee under *West Virginia Code* § 55-7-6. The debtor had her own separate bankruptcy counsel at all times involved in this matter;

(b) Whether Respondent Nace actually received notice of the Bankruptcy Court Order entered on March 4, 2005, appointing him as Special Counsel as it appears to have been admittedly sent to the wrong business address because same was provided to the Clerk by the Trustee;

(c) Whether the contact between D. Michael Burke and the Trustee, as limited as it was, suffices and amounts to actual or constructive notice to Respondent Nace as to any significant event, and any obligation he might have had to the Trustee or the Bankruptcy Court as Special Counsel since he clearly was not party to such communications between Burke and the Trustee until after the underlying medical malpractice case had been tried and resolved and the settlement proceeds were distributed pursuant to the Circuit Court's Order;

(d) Whether there was any harm to any entity for whom Respondent Nace had any legal or ethical duty or obligation (for example, the amount of the creditor claims which may have been made – in the absence of knowing this information, there may have been no harm since any recovery made by the debtor individually as a potential statutory wrongful death distributee

would have been more than sufficient to fully pay any unsatisfied creditor claims); and,

(e) Whether the actions of the Trustee appointed by the Bankruptcy Court, who is the Complainant in this lawyer disciplinary procedure, were negligent or wrongful and caused or contributed to the problem encountered by Respondent Nace and D. Michael Burke in their attempt to represent the personal representative appointed for the estate of the deceased medical malpractice victim. The Hearing Panel Subcommittee refused to consider the Trustee's conduct and emphatically stated, "[t]he Hearing Panel Subcommittee makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter. Report of Hearing Panel Subcommittee, footnote 3, page 24.

10. The bankruptcy adversary proceeding filed against Respondent Nace and D. Michael Burke has not yet been resolved and, at this time, is stayed. However, the undersigned, who was not counsel of record for any party in the adversary proceeding, has requested that his client and his counsel in that proceeding seek to immediately lift the stay and proceed to move the Bankruptcy Court for a determination as to whether Respondent Nace was, in fact, given proper notice of the entry of the Order appointing him as Special Counsel, and for a declaration and resolution of the other important issues identified in paragraph 9, above.

11. In contrast to the Hearing Panel Subcommittee's refusal to consider the Trustee's conduct and the limited discovery afforded under the Rules of Lawyer Disciplinary Procedure, the Bankruptcy Court adversary proceeding provides for full discovery and the ability to ascertain with certainty whether the process of service and the giving of notice of all pleadings and orders entered in the underlying bankruptcy case upon which the Statement of Charges is based were properly utilized so that Respondent Nace was given actual notice of his employment as Special Counsel. Only then can it be properly determined that the Trustee was Respondent Nace's client and, if so, what legal and ethical obligations arose therefrom; and, as this Court is aware, if no attorney-client relationship was formed because of lack of notice and/or lack of mutual assent, there could not be any ethics violation committed by Respondent Nace *vis-à-vis* the Trustee.

12. Respondent Nace and his counsel are mindfully and wholly respectful of the lawyer disciplinary procedure enacted in this State and the Judiciary and appointed lawyer officials participating in it.

13. Respondent Nace and his counsel are simply seeking an opportunity to fully resolve the fundamental factual and legal issues in this unique case in a federal forum which clearly possesses the required subject matter and personal jurisdiction to do so.

14. Respondent Nace and his counsel intend to return to this Court with the rulings of the federal court(s) for completion of this lawyer disciplinary proceeding as it is understood and acknowledged that this Court is the final arbiter of all matters affecting Respondent Nace's license to practice law in the State of West Virginia.

15. Respondent Nace and his counsel believe that the issues presented are of constitutional magnitude as Respondent Nace has a vested substantive due process interest in his law license to practice law in the State of West Virginia.

16. Respondent Nace and his counsel do not submit this Motion for Stay, are not exercising the right of appeal to the United States Court of Appeals for the Fourth Circuit and seek immediate lifting of the stay in the bankruptcy adversary proceeding for any improper purpose including the delay of this lawyer disciplinary proceeding.

17. Absent a full and fair resolution of these issues under the United States Bankruptcy Code by the Bankruptcy Court or the District Court, Respondent Nace's substantive and procedural due process rights, as protected under the United States and West Virginia Constitutions, are in serious jeopardy and call into question the doctrines of federalism and comity.

WHEREFORE, Respondent Barry J. Nace respectfully requests that this Court enter an Order staying this lawyer disciplinary proceeding until either

the appeal to the United States Court of Appeals for the Fourth Circuit is completed or the Bankruptcy Court resolves the adversary proceeding initiated by the Trustee, at which time this matter should be immediately brought back before this Court so that it can be timely resolved.

Respectfully submitted this 28th day of November, 2012.

/s/ JMB
J. Michael Benninger, Esquire
W.Va. State Bar No. 312
Benninger Law
PROFESSIONAL LIMITED
LIABILITY COMPANY
P. O. Box 623
Morgantown, WV 26507
(304) 241-1856
mike@benningerlaw.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Barry J. Nace, Esquire, do hereby certify that on November 29, 2012, the foregoing **Respondent Barry J. Nace's Motion to Stay** was duly served upon counsel of record by depositing a true and exact copy thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

Jessica H. Donahue Rhodes
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

/s/ JMB
Counsel for Barry J. Nace, Esquire